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In The

Supreme Court of the United States

EMPACADORA DE CARNES
DE FRESNILLO, S.A. DE C.V.,
BELTEX CORPORATION, and
DALLAS CROWN, INC.,

Petitioners,

v.

TIM CURRY, DISTRICT ATTORNEY,
TARRANT COUNTY TEXAS,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In the Federal Meat Inspection Act, Congress declares that horsemeat is a part of "the Nation's total food supply" and that "all articles and animals which are regulated by this act are either in interstate or foreign commerce or substantially affect such commerce. . . ." 21 U.S.C. §§ 601(j) and 678. For decades, two packing houses transported horses from across the nation to Texas and processed the meat under U.S.D.A. authority for sale in foreign counties, and a Mexican plant imported its product for export though Texas' international ports. A 1949 Texas law, discovered by animal rights activists in 2002, criminalizes possession of horsemeat if it is intended for sale for human consumption. Tex. Agric. Code Ch. 149. The Fifth Circuit concluded that the Texas law, which shut down the Texas Plants and prohibited import for export by the Mexican plant, did not burden interstate or foreign commerce and was not preempted by the Federal Meat Inspection Act. The Fifth Circuit's decision raises these issues that impact interstate and foreign trade.

1. Can individual states determine "what meats may be available for slaughter and human consumption" or has Congress in the FMIA and Packers and Stockyard Act preempted such state legislation?

2. Is a state prohibition against possessing federally approved food, deemed to be in interstate and foreign commerce and transported into and out of that state for sale in foreign commerce, a *per se* violation of the Foreign Commerce Clause?

QUESTIONS PRESENTED – Continued

3. Does a state's total ban on the import and export of a food product, which is authorized for import and export by the federal government, pose a substantial burden on interstate and foreign commerce that can only be tolerated if the state asserts an important safety interest that cannot be protected by less intrusive means?

RULE 29.6 STATEMENT

Petitioners and their parent companies are privately owned and no publically held company owns 10% or more of the stock of the petitioners or their parent companies.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Empacadora de Carnes de Fresnillo, S.A. DE C.V., Beltex Corporation and Dallas Crown, Inc., respectfully petition for a writ of certiorari to review the judgment in this case of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the court of appeals is reported at 476 F.3d 326 (App. 1). The decision of the United States District Court for the Northern District of Texas granting summary judgment in favor of petitioners is unreported, but can be found at 2005 WL 2074884 (N.D. Tex.). (App. 20)

JURISDICTION

The judgment of the Fifth Circuit was entered on January 19, 2007. The Court denied the Petition for Reconsideration En Banc on March 5, 2007. (App. 3) The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS

Tex. Agric. Code Ann. § 149.002 (Vernon 2004) – Sale or Possession of Horsemeat

A person commits an offense if:

(1) the person sells, offers for sale or exhibits for sale horsemeat as food for human consumption; or (2) the person possesses horsemeat with the intent to sell the horsemeat as food for human consumption.

The other relevant sections of Chapter 149 are located in the Appendix. (App. 72-75)

UNITED STATES CONSTITUTION

Article 1, Section 8, Clause 3. Regulation of Commerce

[The Congress shall have Power] To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.

FEDERAL STATUTES

Packers & Stockyards Act, 7 U.S.C. § 182 (West 1999 & Supp. 2006) (App. 47)

* * *

Packers & Stockyards Act, 7 U.S.C. § 183 (West 1999) (App. 48)

For the purpose of this chapter a transaction in respect to any article shall be considered to be in commerce if such article is part of that current of commerce usual in the livestock and meat-packing industries. . . .

For the purpose of this section the word "State" includes Territory, the District of Columbia, possession of the United States, and foreign nation.

Federal Meat Inspection Act, 21 U.S.C. § 601 (West 1999 & Supp. 2006) (App. 53)

Federal Meat Inspection Act, 21 U.S.C. § 602 (West 1999) (App. 57)

Meat and meat food products are an important source of the Nation's total supply of food. They are consumed throughout the Nation and the major portion thereof moves in interstate or foreign commerce.

* * *

It is hereby found that all articles and animals which are regulated under this chapter are either in interstate or foreign commerce or substantially affect such commerce. . . .

Federal Meat Inspection Act, 21 U.S.C. § 615 (App. 60)

Federal Meat Inspection Act, 21 U.S.C. § 616 (West 1999) (App. 60)

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Federal Regulations

9 C.F.R. § 94.15 (2006) (App. 66)

(a) Any animal product or material which would be eligible for entry into the United States, as specified in the regulations in this part, may transit through the United States for immediate export. . . .

STATEMENT

For decades, two U.S.D.A. approved horsemeat packing plants operated in Texas – Beltex Corporation and Dallas Crown, Inc (the Texas Plants). R. 34, Exs. A, B, D, E. Of the 50,000 horses processed a year, 90% were transported to the Texas Plants from states other than Texas. *Id.* All the horsemeat packaged in Texas was transported in and through Texas for shipment to foreign markets by air or sea. *Id.* No meat was sold for human consumption in Texas. The Texas Plants were regulated by the federal government – from transporting live horses to the plants, to packaging, to U.S.D.A. certification of the meat for export to Europe and Japan. 7 U.S.C. §§ 181 *et seq.*; 7 U.S.C. § 1901; and 21 U.S.C. § 601 *et seq.* (App. 47-65)

A third plant, Empacadora, a Mexican corporation, processed Mexican horses for human consumption. R. 34, Exs. A, B ¶6. Empacadaro transported its product into the United States in sealed containers that passed through United States Customs inspections at United States ports of entry at the Texas border. *Id.* at ¶11. Importation of food from Mexico is sanctioned under NAFTA. 19 U.S.C. § 3311. (App. 52) Any product like Empacadora's that is "eligible for entry into the United States . . . may transit through the United States for immediate export" if "the United States Plant Inspection and Quarantine Officer at the

United States port of arrival" is notified and the "animal product remains sealed in a sealed container while being transported" for "immediate export." 9 C.F.R. § 94.15(a)(1) and (2). (App. 66)

After Empacadora's product crossed the border, Beltex took title to it in Laredo, Texas. R. 34, Exs. A, B. It then sold the product to European customers. *Id.* at ¶10. Some of the meat was transported by common carrier to Dallas-Fort Worth International Airport for export, some was shipped overseas from Houston by ship. *Id.* at ¶13.

In 2002, animal rights activists discovered an unenforced 1949 Texas statute criminalizing the possession or transportation of horsemeat intended for sale for human consumption. The statute, originally part of the 1945 Texas Meat Inspection Act, had been enacted to "protect the public health" from adulterated or mislabeled food. R. 1, Apx. 1b. A Texas State Representative requested an opinion on the validity of the statute from then Senatorial candidate and Texas Attorney General John Cornyn, who opined that the law was valid and could be enforced by district or county attorneys. Tex. Atty. Gen. Op. JC-0539 (2002). R. 462.

Beltex operates in Fort Worth, Tarrant County, Texas. Beltex, Dallas Crown and Empacadora all transported packaged food to Dallas/Fort Worth International Airport for air shipment overseas. R. 34, Exs. A, B, D, E. The airport is in Tarrant County. Tarrant County's District Attorney Tim Curry threatened prosecution. R. 468. A newspaper reported that the district attorney in Kaufman County, where Dallas Crown operated, might prosecute. Petitioners sued both district attorneys to restrain prosecution under Chapter 149. The Kaufman County District Attorney swore he did not intend to prosecute and was

dismissed from the lawsuit. R. 531. The case was presented on cross-motions for summary judgment on a stipulated record.

On August 25, 2005, the district court granted a permanent injunction. (App. 20) Tracing the convoluted history of Chapter 149, the court concluded that Chapter 149 was repealed in 1969 when the Texas Meat and Poultry Inspection Act authorized the inspection and approval for sale for human consumption of properly labeled horsemeat. (App. 31) The 1989 revision of the Act, later codified as Texas Health & Safety Code Chapter 433, permitted sale of "a meat food product of a horse" that was properly labeled. (App. 31) The district court also found that the 1997 "Horse Theft Bill" supported the conclusion that Chapter 149 was repealed because the legislative history specifically addressed the "two plants . . . located in Kaufman, approximately 35 miles east of Dallas and Fort Worth. . . ." (App. 32); *and see* Tex. Agric. Code § 148.029. (App. 72)

The district court also held that Chapter 149 violated the dormant Commerce Clause. (App. 35) The court decided that while Chapter 149 did not discriminate *per se* in favor of in-state interests, it placed an unconstitutional burden on interstate and foreign commerce in relation to the professed local benefits, which were not actually furthered by the statute. (App. 37) Finally, the district court concluded that Chapter 149 was preempted by the FMIA because it was an impermissible attempt by Texas to regulate "the premises, facilities, or operation of the slaughter houses." (App. 43)

The Fifth Circuit reversed. (App. 1) First, it held that Chapter 149 was not repealed by Health & Safety Code

Chapter 433, because the later act did not purport to legalize human consumption of horsemeat, it only regulated meats that are legal to process for food. (App. 7) Second, the Fifth Circuit rejected the district court's conclusion that federal law expressly preempted Chapter 149, deciding that the FMIA preemption "concerned only standards of quality and packaging . . . matters Chapter 149 is entirely unconcerned with." (App. 12) The Circuit Court reasoned that the FMIA provision "in no way limits states in their ability to regulate what types of meat may be sold for human consumption in the first place." (App. 12) The Fifth Circuit rejected implied conflict preemption because one could comply with both the state and federal laws simply by not possessing horsemeat for sale for human consumption. (App. 15)

The court held the dormant Commerce Clause was not violated because Chapter 149 "does not implicate foreign commerce as statutes placing import and export restrictions do" or place "restrictions on products used constantly and exclusively . . . in foreign commerce would." (App. 15-16) The court stated that since none of the Petitioners "merely transports horsemeat through Texas," it did not have to consider Chapter 149's impact on interstate transportation of horsemeat through Texas. *Id.* The court reasoned that Chapter 149 treated interstate and interstate commerce in the same manner (both were prohibited); therefore, there was no *per se* violation of the commerce clause. (App. 17) The court held that the incidental burdens on interstate commerce were no greater than those on intrastate commerce; Mr. Curry's asserted local benefits of (1) preserving horses, (2) preventing the consumption of horsemeat, and (3) preventing horse theft were legitimate purposes; and these purposes could not be

achieved with less impact on interstate commerce. Thus, Chapter 149 survived the *Pike* test and did not violate the dormant Commerce Clause. (App. 17-19)

The Fifth Circuit's decision has stopped the processing, transporting, importing and exporting of horsemeat in interstate and foreign commerce, and the predicted consequences of upholding Chapter 149 are now realities. Beltex and Dallas Crown have ceased all production of horsemeat, whether for animal food or human consumption. The food product that was sold in foreign commerce, transported by trucks in and out of Texas, and shipped to foreign destinations from Texas by airplanes and ships has ceased. R. 34, Ex. A ¶2.1. Horsemeat exported from the United States, in 2001 over 11,940 metric tons worth more than $50 million, is no longer being shipped to Europe and Asia. R. 34, Exs. A ¶2.6, B ¶2.7. The over 75,000 horses a year processed by Beltex, Dallas Crown and Empacadora in or passing through Texas for foreign sales has ceased. *Id.* Horse slaughter production lines for human food, built to meet the Humane Methods of Slaughter Act, 7 U.S.C. § 1901, are idle and cannot be used for most other animals without modification. R. 34, Ex. A ¶2.8.

The ranchers, farmers, and horse owners with unwanted animals (ninety percent from outside of Texas), once purchased by commercial buyers at auctions across the nation for between $300 to $700, no longer have an economically beneficial and guaranteed humane way to dispose of these horses. R. 34, Exs. A ¶2.7, B ¶2.7. The commercial truckers, who transported horses across the central United States to the Texas slaughterhouses and purchased the federally mandated single-deck trailers designed to humanely transport live horses to slaughterhouses in accordance with the Federal Commercial Transportation of

Equines to Slaughter Act, 7 U.S.C. § 1901, now must find another way to meet their payments. R. 34, Ex. A ¶2.7.

The $3,000,000 Beltex paid a year for transportation in interstate and foreign commerce will not be made to American Airlines, Delta Airlines, and the freight forwarders. R. 34, Ex. A ¶4.1. Empacadora, with 2001 sales exceeding $63,000,000 (Pesos) and freight charges exceeding $1,500,000 (Pesos), cannot enter Texas to distribute its product in foreign commerce. It is now illegal to transport the product to Houston's ports or airport or to DFW Airport for export. R. 34, Ex. A ¶4.3.

REASONS FOR GRANTING THE PETITION

The Fifth Circuit's decision in this case sets a dangerous precedent: It allows a state to determine not only what food products can be produced and consumed within the state but authorizes the state to determine what products can cross its borders and utilize its highways and ports, without justifying its embargo as one protecting public health or safety. Texas prohibits the commercial enterprise of preparing and transporting horsemeat, ostensibly to preserve horses and stop people from eating horsemeat, though most of the horses come from outside Texas and none of the meat is for sale within the state.

If the Fifth Circuit's decision stands, any state can close its borders to transportation of a product that Congress declares is part of the nation's food chain "in interstate or foreign commerce" – a product regulated, inspected, and approved by the federal government as fit for human consumption – and transported in interstate and foreign commerce and sold solely to foreign markets

using U.S.D.A. federal export certifications accepted by foreign countries under federal treaties and agreements. The issue, whether the Commerce Clause prohibits states from stopping interstate and foreign commerce in, into, through and from the state without a public safety justification, warrants immediate review by this Court.

A. Banning Horse Slaughter For Human Consumption Is A National Issue That Should Be Decided By Congress, Not The States.

1. Preemption: Because Congress declared horses and their meat product to be articles in interstate and foreign commerce for the purposes of transport to slaughter, processing, inspection, packaging, labeling, import and export, it is not permissible for Texas to ban what Congress regulates.

The statutory scheme that regulates slaughter for human consumption is pervasive. The 1921 Packers and Stockyards Act, 7 U.S.C. § 181 *et seq.*, "secured the free and unburdened flow of livestock to stockyards and slaughterhouses and to their final destination." *Stafford v. Wallace*, 258 U.S. 495, 514 (1922). Section 182 defines "livestock" to include "horses," and as such they are included in the commerce of "all livestock products that will transit from a state after purchase to another state or foreign nation. . . ." 7 U.S.C. § 183. (App. 48) In the Federal Meat Inspection Act (FMIA) Congress declared that "all articles and animals which are regulated under this chapter are either in interstate or foreign commerce or substantially affect such commerce. . . ." 21 U.S.C. § 602. (App. 57) Horses are animals regulated under the FMIA. 21 U.S.C. § 601(j). (App. 54)

The FMIA includes provisions regarding examination of animals before slaughtering, humane methods of slaughter, post-mortem examination of carcases, and inspection of meat food products. 21 U.S.C. §§ 603, 604 and 606. Horses are specifically included in the procedures for the examination of animals before slaughter and humane methods of slaughter. 21 U.S.C. § 603. (App. 58)[1] Beltex and Dallas Crown exported their products under certificates issued by U.S.D.A. inspectors located at their plants. 21 U.S.C. §§ 615-16. (App. 60) Empacadora imports meat into the United States in sealed containers for immediate export under FMIA § 620 and 9 C.F.R. § 94.15. (App. 66)

Congress limits the states' jurisdiction to regulate activities governed by the FMIA. While citing no authority, the Fifth Circuit declared that the "FMIA contains a narrow inspection and labeling preemption clause. . . ." (App. 13) But the FMIA has a broad preemption clause at 21 U.S.C. § 678:

> **Requirements within the scope of this chapter with respect to premises, facilities and operations of any establishment at which inspection is provided** under subchapter I of this chapter, which are **in addition to, or different than those made under this chapter may not be imposed by any State** or Territory or the District of Columbia, except that any such jurisdiction may impose recordkeeping and other requirements within the scope of section 642 of this

[1] Before November 10, 2005, the FMIA specifically listed the animals including horses as subject to the Act, so they are by definition an "amenable species" like cattle, swine and goats. 21 U.S.C. § 601(w); Agriculture Appropriations Act of 2006, Pub. L. No. 109-97 § 789(1).

> title, if consistent therewith, with respect to any such establishment. **Marking, labeling, packaging, or ingredient requirements in addition to, or different than, those made under this chapter may not be imposed by any State** or Territory or the District of Columbia with respect to articles prepared at any establishment under inspection in accordance with the requirements under subchapter I of this chapter, but **any State** or Territory or the District of Columbia **may, consistent with the requirements under this chapter, exercise concurrent jurisdiction with the Secretary over articles required to be inspected under said subchapter I, for the purpose of preventing the distribution for human food purposes of any such articles which are adulterated or misbranded and are outside of such an establishment**, or, in the case of imported articles which are not at such an establishment, after their entry into the United States. This chapter shall not preclude any State or Territory or the District of Columbia from making requirement or taking other action, consistent with this chapter with respect to any other matters regulated under this chapter. (App. 63, emphasis added.)

The FMIA expressly preempts state legislation in the area of commerce to which Chapter 149 applies. In 1949, the Texas act was a public health law meant to protect the public from mislabeled or adulterated meat. *See Gordy v. State*, 264 S.W.2d 103 (Tex. Crim. App. 1953). Subsequently, the Texas Legislature replaced the 1949 act with meat inspection legislation consistent with the FMIA, specifically permitting inspections by Texas Health Department inspectors of horsemeat intended for sale in

Texas for human consumption. Health & Safety Code Ch. 433. (App. 76)

The FMIA prohibits the sale of any meat, including horsemeat, for human consumption **unless** the commercial processor complies with federal laws. Once the processor complies with all federal laws and requirements, the prohibition against selling the meat is lifted and the processor has a legal right to sell the meat in interstate and foreign commerce. At that point, when it becomes legal under federal law to sell the meat for human consumption, the Texas law criminalizes possession of the meat because it is then intended for sale for human consumption. (App. 73) Thus, Chapter 149 imposes additional and different requirements on the federally regulated "premises, facilities and operations" as well as the food product.

The U.S.D.A. approves horsemeat for sale for human food, and the Texas Plants package, mark and label it per federal regulations. Under Chapter 149, food labeled "horsemeat" and "U.S.D.A. approved" cannot contain the ingredient horsemeat or the package must be additionally labeled "not for sale for human consumption." This constitutes an impermissible state regulation of either (1) an ingredient or (2) a labeling requirement "in addition to, or different than, those made under this Act. . . ."

The Fifth Circuit found no conflict between the FMIA, which makes it legal to sell the product in interstate and foreign commerce, and the Texas law, which prohibits the sale in interstate and foreign commerce. The Fifth Circuit resolved the conflict by observing that "it is possible to comply with both state and federal law" by simply not engaging in the commercial activity in Texas. (App. 15) But there could never be a conflict between state and

federal laws if "just say no" were the test. The test is whether the state law prohibits what the federal law requires. *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 799 (1993).

The conflict between the FMIA and Chapter 149 is apparent when one recognizes that under Texas law, the U.S.D.A. inspectors' actions at the Texas Plants in enforcing federal health laws is criminalized under Texas law. The FMIA mandates that the U.S.D.A. inspect the carcasses of horses when the meat is intended for export. 21 U.S.C. § 615. (App. 60) Federal agents, who possess, inspect, examine and control the meat from entry to the plants to the packages leaving the plants, possess horsemeat intended for human consumption. States cannot criminalize the conduct of federal inspectors implementing federal law.

The Fifth Circuit decision represents a significant shift in preemption jurisprudence. If Congress has not preempted the field then states and cities will be able to dictate what food products can pass their borders.[2] Even if federal law does not expressly preempt the field, the Congressional declaration that horsemeat processing is in interstate and foreign commerce places the decisions about horse slaughter in the national arena. Given the "substantial attention given by Congress to the subject . . . it would be particularly inappropriate to permit state [prohibition] of the subject." *South-Central Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 101 (1984) (J. White, plurality). Chapter 149 impermissibly regulates in the federal domain.

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[2] *See* Chicago, Ill., Code of Ordinances Chap. 7-39-001 (prohibiting food establishments from selling foie gras) (2006); or Chapter 7-40-080 prohibiting bringing into the city the meat of immature calves, pigs and lambs for sale for human consumption) (1996).

2. The emotional issue of horse slaughter for human consumption has been before Congress every year since 2001 without Congress voting to ban the industry.

Activity in the United States Congress during the pendency of this case further demonstrates that regulation of horse slaughter is a federal issue. Bills concerning a federal ban on horse slaughter have been before Congress constantly since 2001.[3] The bills have been hotly debated, but none have been enacted. *See* Cong. Rec. H 6307-37 (Sept. 7, 2006).

A major stumbling block has been how to deal with, and pay for, so many unwanted horses every year. "Debate continues on acceptability of horse slaughter and how to care for and/or humanely dispose of horses if they no longer went for human food." CRS Report RS 21842, "*Horse Slaughter Prevention Bills and Issue*," by G.S. Becker (updated Jan. 23, 2007). In considering H.R. 503 in 2006, the Committee on Agriculture issued an adverse report stating, among other conclusions, that there is "no need for this legislation," it "has far-reaching implications for the entire animal agriculture community," and "would negatively impact the health and welfare of horses." H.R.

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[3] *See* Helping Out to Rescue and Save Equines Act, H.R. 2622, 107th Cong. (1st Sess. 2001); H.R. 3781, 107th Cong. (2d Sess. 2002) (An Act "to prevent the slaughter of horses in and from the United States for human consumption" by prohibiting the slaughter of horses and trade in horseflesh . . .); H.R. 857, 108th Cong. (2d Sess. 2003) (same as H.R. 3781); H.R. 503, 108th Cong. (1st Sess. 2005) (A bill to amend the Horse Protection Act [prohibits soring of Tennessee Walking Horses] to prohibit sale or exchange of horses if intended to be slaughtered for human consumption); H.R. 503, 110th Cong. (1st Sess. 2007) (same as previous H.R. 503).

Rep. No. 109-617, 109th Cong. (2d Sess. 2006). Despite the committee's rejection, just before the 2006 elections the House of Representatives passed the ban on the possession or sale of horses for slaughter for human consumption. H.R. 503, 108th Cong. (1st Sess. 2005). The Senate did not act, and the legislation expired at the end of the term.

In 2005, Congress passed an agriculture appropriations bill that eliminated funding for ante-mortem U.S.D.A. inspections at horse-slaughter plants for FY 2006. Ante-mortem Inspection and Applicable Requirements, 71 Fed. Reg. 6341 (Feb. 8, 2006) to be codified at 9 C.F.R. pt. 352.19.[4] The plants applied to the U.S.D.A. and were granted fee-for-service inspections. The Humane Society of the United States sued the U.S.D.A. in an attempt to stop the fee-for-service inspections. Judge Kollar-Kotelly recently ruled that in issuing the emergency rule the U.S.D.A. failed to follow the Administrative Procedures Act and the Federal Environmental Protection Act when it did not consider whether an Environmental Assessment was required before implementing the new rule. *Humane Society of the U.S. v. Johanns,* No.1:066-0265-CKK (D. D.C. March 28, 2007) (not released for publication). Because Congress has not completed an appropriations bill for 2007, the 2006 Act is still in effect, and the ruling voided the emergency rule and stopped production at the only remaining horse slaughter plant, located in Illinois.[5] Congress's extensive involvement in

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[4] This was achieved with the same legislation that replaced the phase "cattle, sheep, swine, goats, horses, mules, and other equines" with "amenable species" in several sections of the FMIA and related regulations.

[5] Judge Kollar-Kotelly's ruling does not moot the issues presented by this case because Congress could fund the inspections this year, or

(Continued on following page)

the subject demonstrates that horse slaughter for human consumption is a federal issue.

3. Inconsistent state legislation on horse slaughter prevents the nation from speaking with one voice in an area dominated by federal law.

Only two other states currently ban the possession of horsemeat intended for sale for human consumption. 63 Okl. St. Ann. § 1-1135. Oklahoma's ban is almost identical to Chapter 149, and it is still classified as a food safety law. *Id.* Mississippi defines horsemeat as "unfit for human consumption." Miss. Code Ann. § 75-33-3(c). But its more recent intrastate meat inspection law, which like Texas' mirrors the federal act, allows the intrastate sale of horsemeat for human consumption if properly labeled. Miss. Code Ann. § 75-35-25. California is the only state to have recently enacted a law related to horse slaughter for human consumption. West's Ann. Cal. Penal Code § 598c (1999). It differs from Texas' and Oklahoma's laws in that it prohibits the slaughter of horses and the possession or sale of a horse if it is intended to be slaughtered for

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the U.S.D.A. could correct the alleged procedural deficiencies in enacting fee-for-service ante-mortem inspections. Even if the funding is not restored or the rule is not adopted, federal law still permits Empacadora's import of its product for export through Texas' international seaports and airports. 9 C.F.R. § 94.15 (App. 66) If Congress chooses to ban the slaughter of horses for human consumption in the United States, the issue raised by Texas' ban on the Empacadora product still must be addressed because the legislation would not prohibit import of horsemeat for human consumption, which the FMIA expressly permits. *See* H.R. 503, 110th Cong. (1st Sess. 2007) (bans slaughter of horses for human consumption, but does not prohibit transport or possession of the meat for human consumption).

human consumption. *Id.* California also prohibits local food establishments from offering horsemeat for human consumption. *Id.* at § 598d. But California does not prohibit the transport of horsemeat for human consumption.

The other 44 continental states do not prohibit the possession or transport of horses or horsemeat for human consumption. Texas cannot force the transport of an otherwise legal product to go around its borders, yet Empacadora is forced to transport around Texas to access international ports. *Kassel v. Consol. Freightways Corp.*, 450 U.S. 662, 670 (1981). If the United States wants to shut its borders to a product, that issue should be decided by Congress for the nation as a whole, not by individual states.

B. Because Horse Slaughter For Human Consumption Is A National Issue Regulated By Congress, Which Concerns Foreign Commerce, Texas' Regulation Banning Possession Of Horsemeat For Import And Export Violates The Commerce Clause.

1. Foreign Commerce is strictly the domain of Congress, and Texas' embargo on the importation of horsemeat for immediate export is a *per se* violation of the Foreign Commerce Clause.

Federal plenary power over foreign trade is well established. *Bd. of Trustees of Univ. of Ill. v. United States*, 289 U.S. 48, 56-7 (1933). "As an exclusive power, its exercise may not be limited, qualified or impeded to any extent by state action." *Id.* It is Congress's power to determine what articles can be imported and the terms of importation. Congress, not Texas and not the Fifth Circuit,

should decide if the nation's borders should be closed to the transport of foreign horsemeat for sale in foreign markets.

The Fifth Circuit decided the Foreign Commerce Clause was not implicated in this case, holding:

> We do not address the potential application of Chapter 149 to an entity that **merely transports horsemeat through Texas but engages in no other commercial activity** within the State, as Empacadora speculates it may do one day. That hypothetical situation is not before us. While prosecuting such a company would raise unique dormant Commerce Clause concerns – specifically with regard to the Foreign Commerce Clause – none of the slaughterhouses fit that description, **nor does there appear to be any company that merely transports horsemeat through Texas**. (Emphasis added)

(App. 16) Whatever "merely" means in those two sentences, the stipulated facts belie the conclusion that foreign commerce is not implicated.

First, there is the foreign commerce from Mexico, which Texas now embargos. Empacadora slaughters horses in Mexico for human consumption. R. 34, ¶6. Empacadora transported its product into the United States in sealed containers that passed through United States Customs inspections at United States ports of entry at the Texas border. *Id.* at ¶11. Importation of food from Mexico is sanctioned under NAFTA. 19 U.S.C. § 3311. (App. 52) Any product like Empacadora's that is "eligible for entry into the United States . . . may transit through the United States for immediate export" if "the United States Plant Inspection and Quarantine Officer at the

United States port of arrival" is notified and the "animal product remains in a sealed container while being transported" for "immediate export." 9 C.F.R. § 94.15(a)(1) and (2). (App. 66) The sealed containers are subject to an international treaty. Containers Convention of 1957, 20 U.S.T. 301 (ratified March 1, 1967). Under the treaty the United States agreed to refrain from introducing "Customs procedures which might have the effect of impeding the development of international transport by container." *Id.*

When Empacadora's product crossed the border, Beltex took title to Empacadora's meat in Laredo, Texas. R. 1199-1203. It then sold the product to European customers. *Id.* at ¶10. Independent ground and air transporters took possession of the product, transporting it in, through and out of Texas. Some of the meat was transported by common carrier to DFW airport for shipment; some was transported overseas from Houston by ship. *Id.* at ¶13.

Even though under federal law it is legal to import the product into any state in the United States with immediate export out of the United States, Empacadora no longer does this because Texas has embargoed the product from being imported. As a result of Chapter 149, this legally produced food product, which still can be legally sent from Mexico through New Mexico to Colorado to Denver's airport for air shipment, cannot enter the United States at its border in Texas.

Empacadora's situation is like that found in *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 6 L. Ed. 23 (1824), where New York closed its borders and navigable waters to steamships from New Jersey. Gibbons wanted to enter New York with his federally licensed vessels. In deciding

the New York act violated the Commerce Clause, Chief Justice Marshall observed that "commerce describes the commercial intercourse between nations and parts of nations. The Commerce Clause, comprehends every species of commercial intercourse between the United States and foreign nations." As a result, "Commerce among the States, cannot stop at the external boundary line of each State, but may be introduced into the interior." *Id.*

Foreign commerce is also implicated in this case because Dallas Crown and Beltex exported all of their product based on export certificates issued by the U.S.D.A. Inspector at each plant. 21 U.S.C. §§ 616-17; 9 C.F.R. § 322.2. (App. 60 and 70) No state is permitted to pass a law or adopt a rule that relates to interstate or intrastate routes or services that prohibits the motor carriers from transporting on state highways U.S.D.A. inspected meat certified legal for export. 49 U.S.C. § 14501. (App. 64) A state cannot enforce a law that prohibits providers of air transport service from accepting and delivering the otherwise legal product overseas. 49 U.S.C. § 41713. (App. 65) And yet that is precisely what Chapter 149 does.

Empacadora's meat product, in sealed containers and after clearing United States Customs, is now stopped at the Texas border. Not by federal law, but by state law. This prohibition cannot withstand Commerce Clause scrutiny. Individual states cannot be allowed to regulate what articles, deemed by Congress to be in commerce, can cross its borders, use its federal highways and access its international ports.

2. Chapter 149 as a regulation of commerce is a *per se* violation of the Commerce Clause, and the Fifth Circuit should not have applied the *Pike* test.

Chapter 149 is *per se* invalid because it creates an embargo on articles in interstate and foreign commerce in an area that Congress has reserved for itself. The Fifth Circuit held, that because Texas enacted a "blanket prohibition" on both intrastate and interstate trade, there was no *per se* violation of the commerce clause. (App. 17) But Chapter 149, because it closes Texas' borders to interstate and foreign commerce, *per se* violates the Commerce Clause. "The clearest example of such legislation is a law that overtly blocks the flow of interstate commerce at a State's borders." *City of Philadelphia v. New Jersey*, 347 U.S. 617, 624 (1978).

Chapter 149 is a *per se* violation because it regulates interstate commerce itself, especially foreign commerce. *H.P. Hood & Sons v. DuMond*, 336 U.S. 525, 537 (1949) ("when a state recognizes an article to be a subject of commerce, it cannot prohibit it from being a subject of interstate commerce; that the right to engage in interstate commerce is not the gift of a state, and that a state cannot regulate it or restrain it.") At no time are the horses or the horsemeat product solely in intrastate commerce. Congress has declared and Texas recognizes that horses and their meat product are articles in and affecting foreign and interstate commerce, and it has enacted legislation that regulates and permits what the Texas law criminalizes.

In 1949, Justice Jackson wrote that the purpose of the Commerce Clause "is that every farmer and every craftsman shall be encouraged to produce by the certainty that he will have free access to every market in the Nation,

that no home embargoes will withhold his export, and no foreign state will by customs duties or regulations exclude them." *H.P. Hood*, 336 U.S. at 539. That is what Chapter 149 denies. The law shuts off access to markets and ports, and it allows Texas to impose an embargo at its borders.

Discrimination may arise through either the purpose or the effect of a statute. *Baccus Imports, Ltd. v. Dias,* 468 U.S. 263, 270 (1984). The Fifth Circuit and Mr. Curry recognized that the direct effect of Chapter 149 is to shutdown the foreign market to the alleged benefit of Texas' horses. (App. 18 and R. 1 Apx. p. 31) This is economic discrimination against foreign commerce subject to the highest scrutiny. *Wunnicke,* 467 U.S. at 101. Even if Chapter 149 escapes classification as an economic regulation, it is not a permissible exertion of state police powers because it directly regulates commerce and there is no health or safety issue involved. *See Kassel*, 450 U.S. 662 (the stated purpose was safety, but the ban was also a protectionist measure to preserve roads). That Texas prohibits commerce in horsemeat allegedly to protect horses and prevent consumption of horsemeat, but not for economic reasons, cannot justify an embargo.

A state "may not accord its own inhabitants a preferred right of access over consumers in other states to natural resources located within its borders." *City of Philadelphia*, 437 U.S. at 627. Texas' alleged "preference for horses" treats Texas horses like a natural resource. But the horses are privately owned and Texas has limited non-Texan horse owners' rights to sell a horse to a packing house in Texas. Preserving Texas' horses by reducing horsemeat consumption and diminishing the incentive for theft is a *per se* Commerce Clause violation because of "the basic principle that a 'State is without power to prevent

privately owned articles of trade from being shipped and sold in interstate commerce on the ground that they are required to satisfy local demands or because they are needed by the people of the State.'" *Foster-Fountain Packing Co. v. Haydel*, 278 U.S. 1, 10 (1928).

Dallas Crown and Beltex find themselves in a situation like that in *Foster-Fountain Packing*. They are prisoners in a state that prohibits them from getting their food product out of the State. In *Foster-Fountain*, shrimpers could not take shrimp out of Louisiana without removing the shrimps' heads and tails, ostensibly to protect the state's natural resources. *Foster-Fountain*, 278 U.S. at 7. The Court held that one should "look to practical considerations and the established course of business" in determining whether a state law "is repugnant to the Commerce Clause. . . ." *Id.* at 10. Beltex and Dallas Crown can slaughter horses in Texas, and freely transport the meat in and out of the state, so long as those who eat it don't buy it or it is sold as animal food. The Texas prohibition relates solely to the intent to sell it for human consumption. The statute that locks Beltex and Dallas Crown into their Texas Plants has a significant affect on foreign commerce, contravening the Commerce Clause. Justice Jackson observed that the *Foster-Fountain* Court invalidated the Louisiana law because it "attempted to promote local interests at the expense of interstate commerce." *H.P. Hood & Sons*, 336 U.S. at 537.

The Fifth Circuit found no *per se* violation because Chapter 149 closed Texas horse slaughter plants and prohibited horsemeat production in Texas. The test for discrimination is not satisfied just because the banned product of in-state and out-of-state producers are treated the same, i.e. banned. The banned product is not harmful;

this is not a permitted quarantine. For Texas to close its borders is a *per se* violation of the commerce clause.

3. Applying the *Pike* test required the Fifth Circuit to weigh the needs of interstate commerce against the state's interests and the Circuit's application demonstrates why the analysis is inappropriate for the judicial process.

The sale of horsemeat for human consumption is a national issue, especially the decision to impose an embargo on the transport of horsemeat for export. Justice Scalia, concurring in *Bendix Autolite Corp. v. Midwesco Enterp., Inc.*, 486 U.S. 888, 897 (1988), stated that "[w]eighing the governmental interests of a State against the needs of interstate commerce is [] a task squarely within the responsibility of Congress . . . and 'ill suited to the judicial function.'" (internal citations omitted). This is particularly true in the present case, where there exists no legislative statement of purpose for Chapter 149 other than a brief "for the public health. . . ." R. 1 Apx. 1b.

Without the benefit of the years of hearings and testimony, after which Congress has not banned slaughter for human food, the Fifth Circuit, disagreeing with the district court, declared there was no burden on interstate commerce and there was no foreign commerce involved. When courts act like legislatures, like legislators they often disagree. The resolution should be a broad application of the *per se* test. State laws that ban federally approved products from being transported, imported, or exported violate the Commerce Clause – comparative interests not withstanding.

4. Even if Chapter 149 is not a *per se* violation and application of the *Pike* balancing test is appropriate, the Fifth Circuit skewed the balance.

The *Pike* test requires that the state (1) prove legitimate local interests are furthered by the regulation and (2) show that no less intrusive alternative means are available. *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970). Illusory or minimal interests do not warrant deference by the courts. *Kassel*, 450 U.S. at 670. State regulation of foreign commerce is subject to higher scrutiny than regulation of only interstate commerce. *Wunnicke*, 467 U.S. at 100.

In reversing the district court, the Fifth Circuit avoided increased scrutiny by declaring that foreign commerce was not implicated, and ignored the stipulated evidence that Empacadora's product is transported through the state. It dismissed a number of ways that the local interests could be addressed with less impact on commerce. And it gave unprecedented weight to non-legislative interests that are not within Texas' police powers to assert over articles outside its borders.

The Fifth Circuit accepted Mr. Curry's claim that Chapter 149 furthered three state interests: "(1) preserving horses, (2) preventing the consumption of horsemeat, and (3) preventing horse theft." (App. 17) No evidence in the record suggests that these were the legislative purposes for Chapter 149. If these politically correct, recently created local interests now justify Chapter 149, the first two are not legitimate interests and Chapter 149 fails to achieve all three.

Texas does not have a legitimate interest in "preserving horses." There is no Texas herd to preserve. Under the pretext that Texas is preserving its horse herd, it regulates private property in other states and Mexico. Texas can assert no interest in preserving horses in other states or foreign countries. Only about 5,000 of the 50,000 horses processed at the Texas Plants are Texas horses. R. 34 at A ¶2.1. None of Empacadora's horses are Texas horses. Texas' professed interest in preserving horses is outweighed by the impact of its law on interstate and foreign commerce.

"Preventing consumption of horsemeat" as a goal of Chapter 149 is another illusory justification. In 1949, Texas did not pass Chapter 149 to stop the rest of the world from consuming horsemeat. There was no way to ship fresh or frozen horsemeat to post-war Europe or Japan. Giant jet cargo planes, with refrigerated and freezer containers, did not fly from Texas cities to Europe. The Texas Legislature was trying to stop smalltime Texas butchers from slipping less expensive horsemeat into unsuspecting consumers' ground beef. *Gordy v. State*, 264 S.W.2d 103 (Tex. Crim. App. 1953). But that problem vanished long ago. Everybody's beef is beef – as certified by the U.S.D.A. There is no horsemeat for sale for human consumption by Texans. Texas has no legitimate interest in regulating what people beyond its borders consume.

If the Texas Legislature wanted to prevent the consumption of horsemeat, it might pass a law prohibiting people in Texas from eating horsemeat. California has – by prohibiting the consumption of horsemeat in California food establishments. Texas cannot legislate for the rest of the country or the world based on its alleged desire to reduce the world consumption of horsemeat by closing the

state's borders, roads, highways, airports and seaports to the healthy food product from other states or foreign countries.

Chapter 149 fails to prevent consumption of horsemeat and fails to preserve horses. It does not forbid eating horsemeat, nor does it prevent horses from being transported to slaughter, and it does not punish those who slaughter horses for food, as long as the food is not intended for sale for people to eat. The Texas Plants can still slaughter horses for food if it is consumed by lions, tigers and large cats. This food can be legally transported in and out of Texas. No Texas statute prevents horse owners or even third parties from killing horses. Tex. Penal Code § 42.09. What is illegal is possessing or transporting U.S.D.A. approved horsemeat into or out of Texas if it is intended for sale for human consumption anywhere in the world.

Texas has a legitimate interest in preventing horse theft. Theft is a crime. Tex. Penal Code § 31.03. The Texas Agriculture Extension Service trains horse owners and law enforcement officers in techniques to reduce horse theft. Tex. Agric. Code §§ 151.001-2. (App. 75) Livestock dealers and slaughter house buyers of horses must maintain records on each horse purchased or sold, including the owner's name, horse description and vehicle license number. 4 Tex. Admin. Code § 49.3. (App. 81) Horses entering Texas in interstate commerce for delivery to the slaughter plant must be accompanied by a waybill to insure traceability of the animals. 4 Tex. Admin. Code § 51. These Texas laws were designed to reduce horse theft; Chapter 149 was not. Forty-eight years after Texas passed Chapter 149 it passed legislation dealing directly with stolen horses that might be sold to the Texas Plants.

This 1997 legislation assessed the Texas Plants a $5.00 per horse fee to pay for inspectors to be on site at the plants to inspect the horses, record who they were purchased from, and record any identifying characteristics of the horses. Tex. Agric. Ch. 148. (App. 72) These records are filed with the County Clerk. The law deters horse theft because thieves who might deliver their stolen prey to one of the plants are met by a licensed state inspector who records their identities and the description of the horses. Even horse thieves know better than to sell their booty to the constabulary.

Chapter 148 imposes no restriction on interstate or foreign commerce. The Fifth Circuit asserted that enacting this law proved that Texas' purpose in enacting Chapter 149 to prevent horse theft proved that horse theft could not be accomplished by less intrusive means. But this is backward. By the Fifth Circuit's own reasoning, it was Texas' 1949 law, Chapter 149, that was inadequate to deter horse theft, not the later 1997 law, Chapter 148. Though Defendant is an elected District Attorney, with access to records on horse theft, there is no evidence that Dallas Crown or Beltex have purchased stolen horses after the passage of the 1997 Horse Theft Bill. Chapter 149 was not passed to remove slaughter houses as a market for stolen horses. If that is now its purpose, Texas has accomplished that purpose by laws that impose little or no burden on interstate or foreign commerce.

Even if Texas' asserted interests are legitimate, Chapter 149's significant burden on interstate and foreign commerce requires that Texas adopt less restrictive means to achieve that goal. No one would seriously advocate criminalizing possession of beef to stop cattle rustling. As the district court pointed out, there are "myriad ways"

Texas can or does achieve its alleged goals with less or no burden commerce. (App. 38)

CONCLUSION

This petition is not about good cowboys who don't eat their horses or bad horse thieves who do – as the Fifth Circuit wrote in its opinion. This petition is about three businesses that have been shut down because an old, forgotten law provided a convenient mechanism for people who want to stop the horse slaughter industry and have lost patience with Congress's reticence and debate. These businesses, operated under the supervision and regulation of the U.S.D.A., provided a service to farmers, ranchers, and horse owners. No one was forced to sell a horse for slaughter or eat horsemeat. But this petition is about more than these businesses. It is about the interaction between the state and federal spheres concerning commerce, agriculture, transportation, and exportation. Chapter 149 prohibits only the commercial activity of possessing and transporting horsemeat that will be sold for human consumption abroad. Considering the implications for preemption and Commerce Clause jurisprudence, this Court should grant the petition for certiorari.

Respectfully submitted,

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476 F.3d 326

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 05-11499

EMPACADORA DE CARNES DE FRESNILLO, S.A. DE C.V.; BELTEX CORPORATION; DALLAS CROWN, INC.,

Plaintiffs-Appellees,

v.

TIM CURRY, District Attorney Tarrant County Texas, Et Al.,

Defendants,

TIM CURRY, District Attorney Tarrant County Texas,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Texas, Fort Worth

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(Filed Jan. 19, 2007)

Before BARKSDALE, BENAVIDES and OWEN, Circuit Judges.

BENAVIDES, Circuit Judge:

The lone cowboy riding his horse on a Texas trail is a cinematic icon. Not once in memory did the cowboy eat his horse,[1] but film is an imperfect mirror for reality.

Texas is home to two of the three slaughterhouses in the United States that process horsemeat for human consumption, with the third operating in Illinois. After several decades of operations, the Texas Attorney General informed them that Texas is one of a handful of states that prohibits their activities. Whether he informed them correctly is the subject of this case.

We VACATE the district court's permanent injunction barring the prosecution of slaughterhouses for processing, selling and transporting horsemeat for human consumption. We hold that Texas Agriculture Code Chapter 149 has not been repealed or preempted by federal law. TEX. AGRIC. CODE ANN. §§ 149.001-.007 (Vernon 2004) ("Chapter 149"). We also find that, as applicable to the parties' activities before us, Chapter 149 does not violate the dormant Commerce Clause.

I. FACTS AND STANDARD OF REVIEW

The Appellees are three slaughterhouses ("the slaughterhouses") that process and sell horsemeat. While the horse byproducts go to various uses – including animal feed, fertilizer and baseball leathers – a substantial majority of the horsemeat is sold and shipped abroad for

[1] Though thieves would occasionally eat the cowboy's horse. *See, e.g., Seven Men From Now* (Batjac Productions 1956).

human consumption. None of the meat is sold domestically for human consumption.

Both Beltex and Dallas Crown operate slaughterhouses in Texas. Beltex owns a controlling interest in the third Appellee slaughterhouse, Empacadora de Carnes de Fresnillo ("Empacadora"). Empacadora operates in Mexico, but sells and transfers its meat to Beltex in Texas, which then sells it abroad. While Empacadora currently operates in Mexico, it has speculated that it will one day come into Texas to handle distribution, sales, and export matters instead of dealing its product through Beltex. The companies have been marketing horsemeat for human consumption as far back as the mid-1970s, but recently the legality of the practice was called into question.

In 2002, Texas State Representative Tony Goolsby requested that the Texas Attorney General clarify the enforceability of Chapter 149, which on its face prohibits the processing, sale or transfer of horsemeat for human consumption. The Attorney General issued an opinion stating that Chapter 149 was applicable to the slaughterhouses in Texas and was not preempted by federal law.

When the slaughterhouses learned of the opinion, and that Beltex and Dallas Crown were facing imminent prosecution, they brought this case. They sought a declaration of legal rights and responsibilities and to enjoin any potential prosecution against them under Chapter 149. They argue that Chapter 149 has been repealed, is preempted by federal law, and violates the dormant Commerce Clause.

The facts of the case are all stipulated, and both parties filed motions for summary judgment. The district

court ruled in favor of the slaughterhouses and permanently enjoined Tarrant County District Attorney Tim Curry ("Curry") from prosecuting the companies under Chapter 149. The court held that Chapter 149 (1) was repealed, (2) was preempted by the Federal Meat Inspection Act, and (3) violated the dormant Commerce Clause. We disagree as to each point.

While we review a district court's grant or denial of a permanent injunction for an abuse of discretion, *Peaches Entm't Corp. v. Entm't Repertoire Assoc.*, 62 F.3d 690, 693 (5th Cir. 1995), we review all three issues of law supporting the district court's injunction *de novo*. *Twin City Fire Ins. Co. v. City of Madison*, 309 F.3d 901, 904 (5th Cir. 2002).

II. DISCUSSION

Before we can consider potential constitutional infirmities in Chapter 149, we must determine whether it is in force. If it has been repealed then we need not address the constitutional concerns the statute raises. *See Elkins v. Moreno*, 435 U.S. 647, 661-62 (1978). While it is generally preferable to avoid such constitutional issues, courts "cannot press statutory construction 'to the point of disingenuous evasion' even to avoid a constitutional question." *United States v. Locke*, 471 U.S. 84, 96 (1985), *quoting Moore Ice Cream Co. v. Rose*, 289 U.S. 373, 379 (1933).

A. REPEAL

It is unchallenged that Chapter 149 prohibits the activities of the slaughterhouses if it is in force. The statute reads:

> A person commits an offense if:
>
> (1) the person sells, offers for sale, or exhibits for sale horsemeat as food for human consumption; or
>
> (2) the person possesses horsemeat with the intent to sell the horsemeat as food for human consumption.

TEX. AGRIC. CODE ANN. § 149.002. It is also an offense to transfer horsemeat to a person one knows or should know intends to do those prohibited activities. *Id.* at § 149.003. This statute was first enacted in 1949, 1949 Tex. Gen. Laws 78. While this statute was recently codified as Chapter 149 in 1991, the slaughterhouses contend that it was repealed by a provision last codified two years earlier in 1989.

We first find that the Texas Meat and Poultry Inspection Act ("TMPIA") has not implicitly repealed Chapter 149 by way of an irreconcilable conflict. *See* TEX. HEALTH & SAFETY CODE ANN. § 433.033 ("Section 433.033"). Alternatively, even if the statutes are irreconcilable, Chapter 149, as the one more recently codified, is controlling.

1. Chapter 149 and Section 433 are not Irreconcilable

Section 433.033, titled "Equine Products," states:

> A person may not sell, transport, offer for sale or transportation, or receive for transportation, in intrastate commerce, a carcass, part of a carcass, meat, or ***meat food product*** of a horse, mule or other equine ***unless*** the article is plainly and conspicuously marked or labeled or otherwise

> identified, as required by rule of the commissioner, to show the kind of animal from which the article was derived.

Id. (emphases added). The slaughterhouses argue that this implicitly permits the sale of horsemeat for human consumption under certain conditions, and thereby repeals Chapter 149.

Implicit repeals are not favored, but if two acts are in irreconcilable conflict the latter controls. *Jackson v. Stinnett,* 102 F.3d 132, 136 (5th Cir. 1996). Statutes are in irreconcilable conflict only if there is a "positive repugnancy" between the statutes, such that one is eviscerated by the other. *See Tenn. Valley Auth. v. Hill,* 437 U.S. 153, 189-90 (1978).

The district court agreed with the slaughterhouses that Section 433.033 recognizes the legality of selling horsemeat for human consumption under certain conditions, and thereby repealed Chapter 149's prohibition of the activity. It made a special note that Section 433.033 applies to "meat food products," which it stressed are defined in the Act as "capable of use as human food." TEX. HEALTH & SAFETY CODE ANN. § 433.003(13). The district court read this to mean that, because horsemeat is "capable for use as human food," it is implicitly legalized for such a purpose. *See* Order Granting Plaintiffs Motion for Summary Judgment at 6 n.5 (Aug. 25, 2005) ("Summary Judgment Order").

The district court misreads Section 433.033. The TMPIA is concerned with meat inspection, labeling, packaging, slaughter, transportation, and various other standards of producing meat. It never purports to legalize for human consumption the meat products covered

therein. For instance, the Act places numerous regulations on "livestock," which covers a variety of meats ranging from domestic rabbits to exotic animals. TEX. HEALTH & SAFETY CODE ANN. § 433.003. Under the slaughterhouses' approach to reading the Act, this would implicitly legalize the sale of all exotic animals and domestic rabbits for human consumption, overriding any statute to the contrary.

The better reading is that the TMPIA is indifferent as to which meats are legal for public sale, but provides general regulations that may be applied to those that are. Just as it did not legalize the sale of all exotic animals for human consumption, it does not legalize the sale of horsemeat by repealing Chapter 149's unambiguous language to the contrary. It does not reach the high standard of irreconcilability required for an implicit repeal.

Furthermore, that a horse "meat food product" is "capable of use as human food" does not mean the product can be legally sold for human consumption. The Act explicitly defines "capable of use as human food" as "not naturally inedible by humans." *Id.* at § 433.003(2). It does not imply that all edible meats are legal for sale as human food, as evidenced by other provisions in the Act that specifically deal with "meat food products" that are "not intended for use as human food." *See, e.g., id.* at § 433.029(b).[2] Human brains are "not naturally inedible by

[2] One could argue that, because the commissioner is only allowed to inspect slaughterhouses where products are processed for human consumption, *see* TEX. HEALTH & SAFETY CODE ANN. § 433.029, the very inclusion of horsemeat in the TMPIA means that it is being treated as legal for human consumption. There is some merit to that point, but we are convinced otherwise for two reasons.

(Continued on following page)

humans," but that does not mean the TMPIA authorizes roadside vendors to start selling them.

Nobody suggests that horsemeat is naturally inedible by humans, just that Chapter 149 makes it illegal to sell for human consumption. Section 433.033 is reconcilable with Chapter 149 by reading it as applying only to horsemeat used for other legal purposes, such as animal feed.

Chapter 149 prohibits the sale of horsemeat for human consumption. That does not conflict with the regulatory purposes of Section 433.033 or its recognition that horsemeat is "not naturally inedible by humans."

2. *Fleming Foods* and Codification's Effect

Even if the statutes are irreconcilable, the latter one controls. *Stinnett,* 102 F.3d at 136. Given Texas's continuing process of codifying its statutes, it is not easy to

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First, nothing in Section 433.033 suggests that horse slaughterhouses are necessarily open to inspection, as it reads, "The commissioner may require an establishment at which inspection is maintained under this chapter to prepare [equine products] in an establishment separate from one in which livestock other than equines is slaughtered." *Id.* at § 433.033. While this language can be read to suggest that horse slaughterhouses are open to inspection, it can just as easily be read to suggest that the commissioner can require horsemeat be prepared in establishments separate from those where inspection is required. Second, since the language of the statute is ambiguous in this respect, we cannot find an implicit repeal as that requires "irreconcilable conflict." Here, there may be a potential conflict, but it can be reconciled through the plausible reading of the statute given here.

We are also mindful of the fundamental rule of statutory interpretation that "specific provisions trump general provisions." *Navarro-Miranda v. Ashcroft,* 330 F.3d 672, 676 (5th Cir. 2003). A general appeal to the purpose of the TMPIA cannot substitute for a thorough reading of the statute's terms.

determine whether Section 433 or Chapter 149 came later. Thankfully that difficult question has already been answered by the Texas Supreme Court in *Fleming Foods of Tex., Inc. v. Rylander,* 6 S.W.3d 278 (1999). We are compelled by that case to find Chapter 149 is controlling as the provision last codified.

By way of background, for the past several decades the Texas Legislative Council has been charged with the task of codifying Texas statutes. TEX. GOV'T CODE § 323. This continuing codification process is meant to clarify and simplify statutes, thereby making them more accessible to the public. *Id.* at § 323.007(a). The council's power is limited, as it "may not alter the sense, meaning, or effect of the statute." *Id.* at § 323.007(b). Codifications are therefore often distinguished from "substantive" enactments.

The statutes at issue here each originated decades ago and each has a rather convoluted history, as the parties discuss at length in their briefs. While Chapter 149 was the one last codified, Section 433 derived from the latter substantive enactment. If these statutes are irreconcilable, do we look toward the most recent substantive enactment or the one last codified?

In *Fleming Foods,* the Texas Supreme Court faced a similar question, asking, "What effect should be given to clear, unambiguous statutes that were drafted by the Legislative Council as part of the codification process but that depart from prior law?" 6 S.W.3d at 283. The court emphasized a need for clarity in finding that "the codifications enacted by the Legislature are the law of this State," and that when "specific provisions of a 'nonsubstantive'

codification and the code as a whole are direct, unambiguous, and cannot be reconciled with prior law, the codification . . . must be given effect." *Id.* at 286.

Fleming Foods indicates that codifications – even if labeled "nonsubstantive" – are legislative enactments that must be given full effect, and such codifications may repeal and prevail over prior laws.[3] The complicated and convoluted statutory history raised by the parties here demonstrates how difficult it would be to implement a contrary rule.

At oral argument the slaughterhouses suggested that a case from the Texas Court of Criminal Appeals stands for the contrary rule. *Ex Parte Holmes,* 754 S.W.2d 676 (1988). In that case, the earlier statute controlled over a subsequent nonsubstantive codification. But the later-codified statute there had an explicit provision indicating that it "does not affect the validity" of the earlier statute in question. *Id.* at 685. The court stressed that this was the "most important" basis for its decision, and that the later codification must be read "in light of" that language. *Id.* at 685-86. Chapter 149 contains no similar language indicating that its provisions yield to Section 433, making *Ex Parte Holmes* inapplicable.

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[3] This case is distinguishable from *Fleming Foods,* since that case dealt with a conflict between a statute and its own subsequent codification. But the language and rationale of that case provide strong support here, since clarity and ease of interpretation both militate in favor of a simple rule that the statute last codified controls. While the rule that the most recent substantive enactment controls might seem equally easy to apply, it requires much more historical research into a statute's origins and deciphering which provisions of a statute are substantive versus mere nonsubstantive codifications. *Fleming Foods* guides us against such a convoluted method of statutory interpretation.

Chapter 149 has not been repealed. We now turn our attention to the constitutional concerns the slaughterhouses raise.

B. PREEMPTION

The first constitutional claim the slaughterhouses raise is that Congress, through the Federal Meat Inspection Act ("FMIA"), has preempted legislation that regulates the sale and transport of horsemeat. If true, the state legislation would be void under the Constitution's Supremacy Clause. U.S. CONST. art. VI cl. 2. When addressing preemption claims, "our sole task is to ascertain the intent of Congress." *Cal. Fed. Sav. & Loan v. Guerra,* 479 U.S. 272, 280 (1987). "Pre-emption is not to be lightly presumed." *Id.* at 281.

A piece of federal legislation can expressly preempt states from legislating in a particular area. Even if a federal statute does not expressly preempt a piece of legislation, it may do so implicitly by directly conflicting with it or by occupying a field so pervasively as to naturally exclude it. *See Perry v. Mercedes Benz of N. Am., Inc.,* 957 F.2d 1257, 1261 (5th Cir. 1992). We can find no indication that Congress intended to prevent states from regulating the types of meat that can be sold for human consumption. We address express and implied preemption in turn.

1. Express Preemption

The FMIA contains an express preemption clause, stating that requirements "with respect to premises, facilities and operations of any establishment at which inspection is provided . . . which are in addition to, or

different than those made under this chapter may not be imposed by any State." 21 U.S.C. § 678. It further prohibits states from imposing different "[m]arking, labeling, packaging, or ingredient requirements." *Id.*

This preemption clause expressly limits states in their ability to govern meat inspection and labeling requirements. It in no way limits states in their ability to regulate what types of meat may be sold for human consumption in the first place.[4]

We cannot read this as expressly preempting Texas's prohibition on horsemeat for human consumption. With little explanation, the district court found, "Preventing slaughterhouses . . . from selling or possessing horsemeat for human consumption . . . is an attempt by Texas to regulate the premises, facilities and operations of [the] slaughterhouses." Summary Judgment Order at 18. But the FMIA's preemption clause is more naturally read as being concerned with the methods, standards of quality, and packaging that slaughterhouses use, matters Chapter 149 is entirely unconcerned with. Chapter 149 does not infringe upon the territory preserved for the federal government by the FMIA's preemption clause.

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[4] As in the TMPIA, the FMIA only states that horsemeat is "capable of use as human food" which applies to any meat unless it is "naturally inedible by humans," denatured, or otherwise identified to deter its use as human food. 21 U.S.C. § 601(j)-(k). It in no way suggests that horsemeat must be legalized for human consumption. This is a less important observation to this analysis than it was to the repeal analysis above, since even if the FMIA implicitly recognizes the legality of selling horsemeat for human consumption, that does not necessarily preclude a state from prohibiting it unless Congress additionally intended to preempt such legislation.

The FMIA does not expressly dispose states of the ability to define what meats may be available for slaughter and human consumption. We therefore find that Chapter 149 has not been expressly preempted.

2. Implied Preemption

Even if state legislation is not expressly preempted, it may be implicitly preempted. Implicit preemption is usually divided into two types: field preemption and conflict preemption. Under neither theory did the FMIA preempt Chapter 149.

Congress did not intend to preempt the entire field of meat commerce under the FMIA. Field preemption requires a clear congressional intent. *Guerra,* 479 U.S. at 281. It occurs when a federal statute's scope "indicates that Congress intended federal law to occupy a field exclusively." *Freightliner Corp. v. Myrick,* 514 U.S. 280, 287 (1995).

The FMIA specifically indicates that it did not intend to preempt the field of meat commerce entirely, stating that it "shall not preclude any State . . . from making requirements or taking other action, consistent with this chapter, with respect to any other matters regulated under this chapter." 21 U.S.C. § 678. Furthermore, the FMIA contains a narrow inspection and labeling preemption clause, and "Congress' enactment of a provision defining the pre-emptive reach of a statute implies that matters beyond that reach are not pre-empted." *Cipollone v. Liggett Group, Inc.,* 505 U.S. 504, 517 (1992).

The Act's title refers specifically to meat *inspection,* rather than a more comprehensive scheme of meat regulation. The need for uniform meat packaging, inspection and labeling regulations is strong, lest meat providers be forced to master various separate operating techniques to abide by conflicting state laws. There is no similar need for uniformity with regard to what types of meat states permit to be sold, especially when considering that horsemeat is only produced for human consumption domestically in Texas and Illinois, and several states have already banned its commercial use for human consumption.[5]

Nor does the FMIA preempt Chapter 149 by conflict. Conflict preemption requires that it would be "physically impossible" for a private party to comply with both federal and state law, or that the law "stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *See Planned Parenthood of Houston & Se. Tex. v. Sanchez,* 403 F.3d 324, 336 (5th Cir. 2005).

It is certainly not physically impossible to comply with the FMIA and Chapter 149. Complying with Chapter 149

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[5] *See* CAL. PENAL CODE § 598c ("Notwithstanding any other provision of law, it is unlawful for any person to possess, to import into or export from the state, or to sell, buy, give away, hold, or accept any horse with the intent of killing, or having another kill, that horse, if that person knows or should have known that any part of that horse will be used for human consumption."); MISS. CODE ANN. § 75-33-3 ("The term 'food unfit for human consumption' shall be construed to include meat and meat-food products of horses and mules."); 63 OKL. STAT. ANN. § 1-1136 ("It shall be unlawful for any person to sell, offer or exhibit for sale . . . any quantity of horsemeat for human consumption."); *see also 2005-2006 Legislative Review,* 12 ANIMAL L. 277, 281 (2006) (counting five states as having enacted such prohibitive legislation).

by not selling, possessing, or transferring horsemeat for human consumption would not breach any provision in the FMIA. And Chapter 149 does not stand as an obstacle to realizing the FMIA objectives of "assuring that meat and meat food products distributed to [consumers] are wholesome, not adulterated, and properly marked, labeled and packaged." 21 U.S.C. § 602. Chapter 149 prohibits a certain type of meat from ever getting to consumers, but the slaughterhouses advance no argument that it increases the risk of having adulterated or mislabeled meat reach consumers.

Congress has not demonstrated any intent through the FMIA, expressly or implicitly, to limit legislation like Chapter 149. We agree with the Texas Attorney General and disagree with the district court in finding that Chapter 149 is not preempted.

C. DORMANT COMMERCE CLAUSE

The final challenge the slaughterhouses raise is that Chapter 149 violates the dormant Commerce Clause. We note at the outset that this case was brought by two slaughterhouses that operate their horsemeat businesses within Texas, and a third that operates in Mexico but transfers and sells horsemeat directly in Texas. This case does not implicate the Foreign Commerce Clause[6] as statutes placing import and export restrictions do, *see, e.g., South Cent. Timber Dev., Inc. v. Wunnicke,* 467 U.S. 82

[6] The Commerce Clause states, in part, that Congress has the power "[t]o regulate Commerce with foreign Nations." U.S. CONST. art. I, § 8, cl. 3. While it is not a stand-alone clause, this portion of the Commerce Clause is often referred to independently as the Foreign Commerce Clause.

(1984), or in the way restrictions on products "used constantly and exclusively . . . in foreign commerce" would. *Japan Line, Ltd. v. Los Angeles County,* 441 U.S. 434 (1979). The slaughterhouses here face potential prosecution for sales and activity that take place directly in Texas.

We do not address the potential application of Chapter 149 to an entity that merely transports horsemeat through Texas but engages in no other commercial activity within the State, as Empacadora speculates it may do one day. That hypothetical situation is not before us. While prosecuting such a company would raise unique dormant Commerce Clause concerns – specifically with regard to the Foreign Commerce Clause – none of the slaughterhouses fit that description, nor does there appear to be any company that merely transports horsemeat through Texas.[7]

The United States Constitution's Commerce Clause provides that Congress has the power to "regulate Commerce . . . among the several States." U.S. CONST. art. I, § 8, cl. 3. It is established that this clause also contains a negative component, referred to as the dormant Commerce Clause, that limits the extent to which States can interfere with interstate commerce. This dormant Commerce Clause keeps States from "plac[ing] burdens on the flow of commerce across its borders that commerce wholly within those borders would not bear." *Am. Trucking Ass'n, Inc. v. Michigan Pub. Serv. Comm'n,* 545 U.S. 429, 433 (2005), *citing Oklahoma Tax Comm'n v. Jefferson Lines, Inc.,* 514 U.S. 175, 180 (1995).

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[7] The only American producer of horsemeat for human consumption outside of Texas operates in Illinois. It is not a party to this case and there is no record as to its exportation routes.

Chapter 149 does not run afoul of the dormant Commerce Clause. It treats both intrastate and interstate trade of horsemeat equally by way of a blanket prohibition. In no way could the prohibition be considered economic protectionism. The statute does not favor in-state actors over out-of-state actors, as evidenced by the fact that this suit was instituted by two Texas slaughterhouses.

Nonetheless, statutes that do not appear to protect in-state economic interests may still violate the dormant Commerce Clause where the incidental burdens on interstate commerce are "clearly excessive in relation to the putative local benefits." *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). The district court points to a number of burdens Chapter 149 places on interstate commerce, but ignores the fact that the "incidental burdens to which *Pike* refers are the burdens on interstate commerce that exceed the burdens on intrastate commerce." *Nat'l Solid Waste Mgmt. Ass'n v. Pine Belt Reg'l Solid Waste Mgmt. Auth.*, 389 F.3d 491, 502 (5th Cir. 2004) (quotation and citation omitted). Neither the district court nor the slaughterhouses point to a single burden that Chapter 149 places on interstate commerce that does not equally befall intrastate commerce.

Even if we credit the district court's list of incidental burdens Chapter 149 imposes on interstate commerce, then the tolerable burden will depend largely on whether the interests involved "could be promoted as well with a lesser impact on interstate activities." *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 471 (1981), *quoting Pike*, 397 U.S. at 142. Curry argues that the statute advances Texas's interest in (1) preserving horses, (2) preventing the consumption of horsemeat, and (3) preventing horse theft.

The district court responds in turn that (1) horses can still be killed for nonhuman consumption, (2) can still be consumed so long as the meat is not purchased, and (3) horse theft is already being prevented by another statute. Summary Judgment Order at 13-14. But the statute does not need to perfectly *fulfill* the identified state interests, it just needs to advance them better than the alternatives.

We are not convinced that removing the significant monetary incentives in the global horsemeat market does not increase the preservation of horses while decreasing the consumption and theft of horses. The district court's belief that Chapter 149 "does very little, if anything, to preserve horses, prohibit human consumption of horsemeat, or prevent horse theft," *id.* at 13, is unfounded.

The alternative measures the district court suggests are not as effective. The district court pointed to several other measures that Texas already has in place, including "support[ing] equine research at its agricultural universities," "encourag[ing] the humane treatment of horses," "regulat[ing] and licens[ing] veterinary care for equines," and "legaliz[ing] parimutuel betting on horse races." *Id.* at 14-15. The district court concluded that "[t]he fact that Texas does all these things and more provides ample evidence that Texas is able to 'preserve horses' without severely or significantly burdening interstate commerce." *Id.* at 15.

The district court's reasoning is backward. That Texas takes numerous measures to preserve horses, beside the blanket prohibition, does not lead to the conclusion that those other measures are adequate. A more natural conclusion is that those measures proved inadequate to preserve horses to the extent desired, prompting Texas to

enforce the more stringent rule found in Chapter 149. Moving beyond the district court's flawed reasoning, it is a matter of commonsense that the alternatives listed do not preserve horses *as well as* completely prohibiting the sale and transfer of horsemeat for human consumption.

The district court erred in finding that Chapter 149 violates the dormant Commerce Clause. It does not favor local industry, place excessive burdens on out-of-state industry, and no alternative measures could advance Texas's interests as effectively.

III. CONCLUSION

Chapter 149 is in force and survives the constitutional challenges raised by the slaughterhouses. Absent these obstacles, the slaughterhouses admit they are in violation of Chapter 149. We therefore VACATE the district court's permanent injunction and REMAND with instructions to grant defendant Curry's motion for summary judgment, thereby dissolving the preliminary injunction preventing Curry from prosecuting the slaughterhouses.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

EMPACADORA DE CARNES DE FRESNILLO, S.A. DE C.V., ET AL.	§	
	§	
	§	
VS.	§	CIVIL ACTION NO. 4:02-CV-804-Y
TIM CURRY, District Attorney, Tarrant County, Texas.	§	
	§	
	§	

ORDER GRANTING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND DENYING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Pending before the Court are two motions for summary judgment: (1) Plaintiffs'[1] motion [doc. #85-1], filed September 2, 2003, and (2) Defendant Tim Curry's motion [doc. #86-1], filed September 22. Having carefully considered the motions, responses, and replies, the Court concludes that Plaintiffs' motion for summary judgment should be GRANTED and Defendant's motion for summary judgment should be DENIED.

Plaintiffs operate horse slaughterhouses in Texas that process the resulting horsemeat, much of it for human

[1] The plaintiffs in this suit are: (1) Beltex Corporation, a meat processing plant in Fort Worth, Texas that has processed horsemeat for human consumption for 28 years; (2) Dallas Crown, Inc., a meat processing plant in Kaufman, Texas that processes horsemeat for human consumption; and (3) Empacadora de Carnes de Frenillo, S.A. de C.V., a Mexican corporation owned by Beltex Corporation that processes horsemeat for human consumption and exports it though Texas for international delivery.

consumption abroad. They filed a complaint on September 26, 2002, seeking to enjoin Defendants Tim Curry, district attorney of Tarrant County, Texas, and Ed Walton, district attorney of Kaufman County, Texas,[2] from enforcing chapter 149 of the Texas Agriculture Code. TEX. AGRIC. CODE ANN. §§ 149.001-.007 (Vernon 2004). The Court, in an order dated April 21, 2003, partially granted Plaintiffs' motion for a preliminary injunction, enjoining Defendant Curry from enforcing chapter 149 of the Texas Agriculture Code against Plaintiffs. Plaintiffs, in their motion for summary judgment, argue that they are entitled to a permanent injunction prohibiting Defendant from prosecuting them under chapter 149 because the statute "(1) . . . conflicts with federal law that preempts state law, (2) unconstitutionally prohibits an activity within the regulatory and legislative province of the federal government, (3) illegally regulates interstate and foreign commerce, and (4) has been repealed expressly or by implication." (Pls.' Mot. for Summ. J. at 2.) Defendant, on the other hand, argues that he is entitled to summary judgment and the preliminary injunction should be dissolved because chapter 149 has not been repealed, is not preeempted, and does not illegally regulate interstate commerce.

I. HISTORICAL BACKGROUND OF CHAPTER 149

Beltex Corporation and Dallas Crown, which are both located in Texas, are the only two processors of horsemeat for human consumption operating in the United States. *(Id.* at 3-4.) According to the plaintiffs, "approximately

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[2] Ed Walton was dismissed from this suit on May 29, 2003.

90% of the horses that [Beltex Corporation and Dallas Crown] slaughter are purchased from owners in other states, and transported in interstate commerce to the processing plants." *(Id.* at 5.) In addition, Empacadora exports horsemeat for human consumption through Texas to be sold to foreign countries. Chapter 149 of the Texas Agriculture Code, however, prohibits the sale of horsemeat for human consumption in Texas. Specifically, section 149.002 states:

> A person commits an offense if:
>
> (1) the person sells, offers for sale, or exhibits for sale horsemeat as food for human consumption; or
>
> (2) the person possesses horsemeat with the intent to sell the horsemeat as food for human consumption.

TEX. AGRIC. CODE ANN. § 149.002 (Vernon 2004). Furthermore, section 149.003 states:

> A person commits an offense if the person:
>
> (1) transfers horsemeat to a person who intends to sell the horsemeat, offer or exhibit it for sale, or possess it for sale as food for human consumption; and
>
> (2) knows or in the exercise of reasonable discretion should know that the person receiving the horsemeat intends to sell the horsemeat, offer or exhibit it for sale, or possess it for sale as food for human consumption.

Id. § 149.003.

The genealogy of chapter 149 is complex and convoluted. In 1945, the Meat Inspection Law was enacted by the 49th Texas legislature with the passage of House Bill ("H.B.") 38. Section 18 of H.B. 38 stated: "It shall be unlawful to sell for food for human consumption meat from the carcass of horses, dogs, mules, donkeys, cats, or other animals not normally used for human food." Act of June 4, 1945, 49th Leg., R.S., ch. 339, § 18, 1945 Tex. Gen. Laws 554, 558. (Pls.' App. at 36.) The purpose of H.B. 38 was to "prohibit and prevent the sale of food for human consumption of meat from animals where said animals suffer from diseases communicable to human beings, and to provide adequate and uniform regulations for inspection of meat and meat products intended for human consumption, thereby protecting the public health." *Id.* at ch. 339, § 2, 1945 Tex. Gen. Laws 554, 554. (Pls.' App. at 32.)

Thereafter, in 1949, the 51st Texas Legislature passed H.B. 17, which eventually became codified into chapter 149. (Pls.' App. at 1A-1B.) H.B. 17 expressly repealed section 18 of the 1945 Meat Inspection Law to the extent of any conflict and replaced it with a broader and more punitive prohibition that stated:

> Sec. 2: It shall be unlawful for any person to sell, offer or exhibit for sale, or have in his possession with intent to sell as food for human consumption, any quantity of horse meat.
>
> Sec. 3: It shall be unlawful for any person to transfer the possession of any horse meat to any other person when the person so transferring knows, or in the exercise of a reasonable discretion should have known, that the person receiving the horse meat intends to sell it, offer it for sale, exhibit it for sale or keep it in his

> possession with intent to sell it as food for human consumption.

Act of Feb. 24, 1949, 51st Leg., R.S., ch. 45, §§ 2, 3, 7, 1949 Tex. Gen. Laws 78, 78-79. (Pls.' App. at 1A-1B.) H.B. 17 was placed in the Penal Code and numbered as article 719e.[3] In 1973, the Texas Penal Code was revised and article 719e was transferred to the civil statutes as article 4476-3a. In 1991, article 4476-3a was codified, without substantive change, into chapter 149 of the Agriculture Code. Act of Mar. 25, 1991, 72nd Leg., R.S., ch. 16, § 2.01(a), 1991 Tex. Gen. Laws 244, 245-48. (Pls.' App. at 6.)

The 1945 Meat Inspection Law, stripped of its prohibition of selling horsemeat for human consumption, was expressly repealed in 1969 by the Texas Meat and Poultry Inspection Act ("the 1969 Act"). Act of Apr. 22, 1969, 61st Leg., R.S., ch. 123, § 412, 1969 Tex. Gen. Laws 337, 354. (Pls.' App. at 38.) But section 12 of the 1969 Act contained a new regulation of the handling of equine meat:

> No person, firm, or corporation shall sell, transport, offer for sale or transportation, or receive for transportation, in intrastate commerce, any carcasses of horses, mules, or other equines or parts of such carcasses, or the meat or meat food products[4] thereof, **unless** they are plainly

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[3] The Court is unclear whether H.B. 17 was actually numbered as Article 916e, as indicted by Plaintiffs, or as Article 719e, as indicated by Defendant and the Texas attorney general, but will assume the attorney general is correct. (*Compare* Pls.' App. at 6 *with* Pls.' App. at 16 *and* Def.'s Mot. for Summ. J. at 21.) Op. Tex. Att'y Gen. No. JC-0539 (2002).

[4] The term "meat food product" was defined as

> any product capable of use as human food which is made wholly or in part from any meat or other portion of the

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> and conspicuously marked or labeled or otherwise identified as required by regulations prescribed by the commissioner to show the kinds of animals from which they were derived. When required by the commissioner with respect to establishments at which inspection is maintained under this title, such animals and their carcasses, parts thereof, meat, and meat food products shall be prepared in establishments separate from those in which cattle, sheep, goats, poultry, domestic rabbits, and domesticated game birds are slaughtered or their carcasses, parts thereof, meat, or meat food products are prepared.

Id. at ch. 123, § 12, 1969 Tex. Gen. Laws 337, 346 (emphasis supplied). (Pls.' App. at 47.) In addition, the 1969 Act

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> carcass of any cattle, sheep, swine, goats, poultry, domestic rabbits, and domesticated game birds, excepting products which contain meat or other portions of such carcasses only in a relatively small proportion or historically have not been considered by consumers as products of the meat food industry, and which are exempted from definition as a meat food product by the commissioner under such conditions as it may prescribe to assure that the meat or other portions of such carcasses contained in such product are not adulterated and that such products are not represented as meat food products. **This term as applied to food products of equines shall have a meaning comparable to that provided in this paragraph with respect to cattle, sheep, swine, goats, poultry, domestic rabbits, and domesticated game birds.**

Act of Apr. 22, 1969, 61st Leg., R.S., ch. 123, § 1(g), 1969 Tex. Gen. Laws 337, 338. (Pls.' App. at 39.) In addition, the term "capable of use as human food" was defied as applying "to any livestock or poultry carcass, or part or product of a carcass, unless it is denatured or otherwise identified as required by regulations prescribed by the commissioner to deter its use as human food, or it is naturally inedible by humans." *Id.* at ch. 123, § 1(h), 1969 Tex. Gen. Laws 337, 338. (Pls.' App. at 39.)

charged the Texas Health Commission with cooperating with the Secretary of Agriculture of the United States "in such a manner as will effectuate the purposes of this Act and said Federal Acts." *Id.* at ch. 123, § 301(a), 1969 Tex. Gen. Laws 337, 349. (Pls.' App. at 50.) The 1969 Act also set out criminal penalties for its violation. Furthermore, section 413 stated, "This Act prevails over the Texas Food, Drug and Cosmetic Act (Article 4476-5, Vernon's Texas Civil Statutes) and any other Act to the extent of any conflict." *Id.* at ch. 123, § 413, 1969 Tex. Gen. Laws 337, 354. (Pls.' App. at 55.)

In 1989, the Texas legislature revised and codified the 1969 Act, placing it in the Texas Health and Safety Code as chapter 433. The policy behind chapter 433 was to protect the public from unwholesome and mislabeled meat food products. As to horsemeat, section 433.033 states:

> A person may not sell, transport, offer for sale or transportation, or receive for transportation in intrastate commerce, a carcass, part of a carcass, meat, or a meat food product[5] of a horse, mule, or

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[5] A "meat food product" is defined as:

> [A] product that is **capable of use as human food** and that is made in whole or part from meat or other portion of the carcass of livestock, except a product that:
>
> (A) contains meat or other portions of the carcass only in a relatively small proportion or that historically has not been considered by consumers as a product of the meat food industry; and
>
> (B) is exempted from the definition of meat food product by the commissioner under conditions that the commissioner prescribes to assure that the meat or other portions of the carcass contained in the product are unadulterated and that the product is not represented as a meat food product.

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> other equine **unless** the article is plainly and conspicuously marked or labeled or otherwise identified, as required by rule of the commissioner, to show the kind of animal from which the article was derived. The commissioner may require an establishment at which inspection is maintained under this chapter to prepare those articles in an establishment separate from one in which livestock other than equines is slaughtered or carcasses, parts of carcasses, meat, or meat food products of livestock other than equines are prepared.

TEX. HEALTH & SAFETY CODE ANN. § 433.033 (Vernon 2001) (emphasis supplied). Section 433.007(a) states that "[t]his chapter prevails over any other law, including Chapter 431 (Texas Food, Drug, and Cosmetic Act), to the extent of any conflict." *Id.* § 433.007(a).

In 1997, Texas adopted revisions to chapter 148 of the Texas Agriculture Code, which contain provisions relating to the slaughtering of livestock. Specifically, the Texas Legislature passed H.B. 2396, known as the "Horse Theft Bill," which required slaughterers to pay $5.00 in fees for each horse purchased for slaughter and to report all horses received. TEX. AGRIC. CODE ANN. § 148.029. (Pls.' App. at 128-38.) The legislative history of H.B. 2396 states:

> CSHB 2396 would allow horse owners to fight the growing problem of horse theft, by mandating inspections of horse slaughtering facilities, training law enforcement agencies about horse

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TEX. HEALTH & SAFETY CODE ANN. § 433.003(13) (Vernon Supp. 2004-05) (emphasis supplied).

> theft, and promoting the use of horse identification marks. Many of the horses stolen in Texas are family pets, whose owners have a deep emotional attachment to them. It is estimated that there are hundreds of horses stolen annually in the state.
>
> . . . Requiring all horses in Texas to be branded would not solve the problem because currently even branded horses are slaughtered without question at the two horsemeat plants in Texas. The two plants are located in Kaufman, approximately 35 miles east of Dallas and Fort Worth. . . .
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> . . . .
>
> Most horses in Texas are stolen for meat. **The two horse meat packing companies in Texas ship meat for human consumption, mostly to Europe.** It is only right that these slaughterers should pay the fees to clean up their industry and pay for inspections to make sure that plants are not rendering stolen horseflesh.

(Pls.' App. at 136-37 (emphasis supplied).)

II. WAS CHAPTER 149 REPEALED BY CONFLICT?

Plaintiffs argue that chapter 149 was repealed by the 1969 Act and that this repeal was recognized by chapter 433 of the Texas Health & Safety Code and by the Horse Theft Bill. (Pls.' Mot. for Summ. J. at 22.) Plaintiffs further state:

> There is a plausible explanation why Chapter 149 is "still on the books." Texas does not publish its statutes; this is left to West Publishing Company. In 1945, the prohibition against the

> sale of horsemeat fell under "Health," not "Agriculture." Then, the statutes were printed under alphabetical headings, not in a code format. Health statutes related to protection of people, while agriculture statutes protect animals. In 1949, a revision to a 1945 health statute was put in the penal code, separated from its initial context under health. In 1969, when the original 1945 Meat Inspection Act was repealed, the prohibition against selling horsemeat was "alone" in the Penal Code. Had it not been moved to the Penal Code, it would be certain that it was repealed. It was not until 1973 that the prohibition was moved from the Penal Code back to the Civil Statutes as Article 4476-3a, even though Article 4476-3 has been expressly repealed in 1969. This "hang-along" needed to be put in a Code when Texas began codification in the 1980s. Someone decided to put it in the Agricultural Code, even though it was not to protect animals, and had started out in the health laws. It should have been dropped from the books because of the 1969 and 1991 repeals, but oversights happen. What is now Chapter 149 of the Agriculture Code has been repealed, and appears there by mistake.

(*Id.* at 22-23.)

Defendant, on the other hand, argues that chapter 149 has not been repealed, stating:

> There is no irreconcilable conflict between Chapter 433 (or the 1969 predecessor) and Chapter 149 (or its predecessors) because both laws can be complied with. *See Dehart v. Town of Austin,* 39 F.3d 718, 722 (7th Cir. 1994) (Federal law regulating maintenance of certain dangerous animals held not in conflict with local law outlawing the same activity, as it was not impossible

to comply with both laws; regulation of animals part of the States' historic police powers). If Plaintiffs comply with Chapter 149, they will never violate either the repealed 1969 law nor the 1989 enactment, Health & Safety Code, Chapter 433. The way one complies with multiple laws is to only do a regulated act where the act is lawful – simple enough. The prohibition in the repealed 1969 Texas Meat and Poultry Inspection Act . . . forbade improperly marked or labeled meat; that Act was not a grant of authority to slaughter horses. It always would have been a simple matter to have complied with both Acts: if no horses were slaughtered for human consumption, there would be none mislabeled. Similar reasoning applies to the 1989 law.

The older (1949's predecessor to Chapter 149) law is more specific and negative – no sales of horsemeat for human consumption – than the laws Plaintiffs suggest as possible repealers. The 1969 and 1989 State meat laws are more general, setting out broadly how Texas plans to cooperate with the Federal government with regard to meat intended for our Nation's food supply. By the reasoning of *Lorenzo Textile Mills, Inc. v. Bullock,* 566 S.W.2d at 110, the older, specific negative language of Chapter 149 carves out an exception to the Health & Safety Code, if such a carving is necessary to allow the two laws to continue in existence. Horses cannot be slaughtered for human consumption as long as Chapter 149 is in effect, even though Texas law has considered and determined how it would handle the issues relating to horsemeat production if the day

> ever comes when such is lawful within the State. That day has not yet come.

(Def.'s Br. in Supp. of Mot. for Summ. J. at 22-23.)

Statutes may be repealed expressly or by implication. Repeals by implication are not favored. *Cook County, Ill. v. United States ex rel. Chandler,* 538 U.S. 119, 132 (2003); *Jackson v. Stinnett,* 102 F.3d 132, 135 (5th Cir. 1996). An exception to this axiom is that if provisions in the two acts are in irreconcilable conflict, the later act constitutes an implied repeal of the earlier one to the extent of the conflict. *Jackson,* 102 F.3d at 135.

In this case, there is a conflict between chapter 149 of the Texas Agriculture Code and section 433.033 of the Texas Health and Safety Code. Chapter 149, which was originally passed in 1949, specifically forbids Plaintiffs from selling, offering for sale, or possessing horsemeat with the intent to sell it for human consumption. In addition, chapter 149 forbids a person from transferring horsemeat to a person who intends to sell the horsemeat for human consumption. However, section 433.033 of the Texas Health & Safety Code, which was originally passed 20 years later, specifically permits a person to sell, transport, offer for sale or transportation, or receive for transportation horsemeat for human consumption as long as the meat is plainly and conspicuously marked or labeled. Because it is impossible to reconcile chapter 149 with section 433.033, the Court concludes that chapter 149 has been repealed by conflict with section 433.033. Defendant argues that the Texas legislature did not mean to legalize the slaughtering of horses for human consumption with the passage of section 433.033 and its predecessors, claiming that the Texas legislature passed them just in

case slaughtering horsemeat for human consumption ever became legal. In addition, Defendant claims that there is no conflict because a person can comply with both laws by not slaughtering horses for human consumption: "[I]f no horses were slaughtered for human consumption, there would be none mislabeled." (Def.'s Br. in Supp. of Mot. for Summ. J. at 23.) However, the Court finds such arguments unpersuasive. To begin with, it is obvious that the Texas legislature, at least by 1997, was aware that Plaintiffs were slaughtering horsemeat for human consumption when they passed the Horse Theft Bill and did not believe that such actions were illegal. In addition, if a person complies with section 433.033, which specifically states that he can sell, transport, or offer for sale or transportation or receive for transportation horsemeat for human consumption as long as he labels the meat properly, then he will definitely be violating the prohibition against such activity contained in chapter 149. Further, Defendant's argument that the Texas legislature passed the 1969 and 1989 Acts regulating Plaintiffs' activities just in case they became legal is specious. As noted by Plaintiffs, "the Texas legislative branch is not a leader in "plan ahead" legislation, and is not so idle that it has nothing better to do every other year for five months than pass laws that regulate activities that are, at the time, criminal." (Pls.' Mot. for Summ. J. at 23.)

III. DOES CHAPTER 149 VIOLATE THE DORMANT COMMERCE CLAUSE?

The Commerce Clause of the Constitution of the United States of America grants Congress the authority to "regulate Commerce with foreign Nations, and among the several States." U.S. CONST. art. I, § 8, cl. 3. Courts have

interpreted the language of this provision as having a negative aspect embedded in the language, designated the dormant Commerce Clause, that implicitly establishes a national free market and restricts state and local governments from impeding the free flow of goods from one state to another.[6] *Wyoming v. Oklahoma,* 502 U.S. 437, 469-70 (1992); *Houlton Citizens' Coalition v. Town of Houlton,* 175 F.3d 178, 184 (1st Cir. 1999). The dormant commerce clause does not affect state or local regulations that are directly authorized by Congress, but only the states' authority to regulate in areas in which Congress has not affirmatively acted. *Houlton,* 175 F.3d at 184.

If a state enacts a law that improperly favors in-state commercial interests over those from out-of-state entities, the Court will declare such a protectionist law unconstitutional under the dormant commerce clause "unless the discrimination is demonstrably justified by a valid factor unrelated to economic protectionism."[7] *Id.* at 184; *see also Granholm v. Heald,* 125 S. Ct. 1885, 1895 (2005). But if the Court finds that the statute does not discriminate on its face, but regulates even-handedly and only indirectly affects interstate commerce, the Court then applies a balancing test to determine its constitutionality and

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[6] "This 'negative' aspect of the Commerce Clause prohibits economic protectionism – that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors." *Wyoming,* 502 U.S. 437, 454 (1992) (quoting *New Energy Co. of Ind. v. Limbach,* 486 U.S. 269, 273-74 (1988)).

[7] Thus, local statutes that facially discriminate against interstate trade are subject to an almost per se rule of invalidity and are routinely struck down because "local economic protectionism is incompatible with the maintenance of a single economic unit." *Homier Distrib. Co., Inc. v. City of Albany,* 681 N.E.2d 390, 393 (N.Y. 1997); *see also Granholm,* 125 S. Ct. at 1897.

upholds the statute unless it places a burden on interstate commerce that is "clearly excessive in relation to the putative local benefits." *Houlton,* 175 F.3d at 189; *see also Granholm,* 125 S. Ct. at 1905. The United States Supreme Court has established a framework for analyzing statutes that do not discriminate on their face:

> Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities. Occasionally the Court has candidly undertaken a balancing approach in resolving these issues, but more frequently it has spoken in terms of 'direct' and 'indirect' effects and burdens.[8]

Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970) (citations omitted).

Based on the foregoing, the threshold question is whether the challenged statute discriminates on its face against interstate commerce or in favor of local businesses and is therefore per se invalid, in contrast to regulating commerce even-handedly with only incidental effects on

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[8] "It is a well-accepted rule that state restrictions burdening foreign commerce are subjected to a more rigorous and searching scrutiny." *South-Central Timber Dev., Inc. v. Wunnicke,* 467 U.S. 82, 100 (1984).

interstate commerce. In this case, chapter 149 of the Texas Agriculture Code does not facially discriminate against interstate commerce in favor of in-state interests. Instead, it applies even-handedly to both in-state and out-of-state interests by prohibiting all persons in Texas from processing, possessing, or transporting horsemeat intended for human consumption. *Cf. Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 470-71 (1981) (holding Minnesota statute that forbade the retail sale of milk in nonreturnable plastic containers, but allowed the sale in nonreturnable paper containers, was applied even-handedly).

Because the Texas statutes are applied even-handedly, the issue becomes whether the burden on interstate commerce is clearly excessive in relation to the local benefits. Defendant argues that the purpose of the statutes is to codify Texas's "preference for horses and its citizens' disfavor of the human consumption of horsemeat" and that the statute "offers protection to horses and horse owners alike from theft by removing one possible market for stolen horses." (Def.'s Br. in Supp. of Motion for Summ. J. at 31.) Plaintiffs, on the other hand, argue that there is no legitimate local public interest furthered by these statutes, except to protect the sensibilities of some Texas residents who are offended upon learning that foreigners are eating horsemeat processed in Texas. (Pls.' Mot. for Summ. J. at 13.)

After reviewing the parties' arguments and the relevant case law, the Court concludes that chapter 149 burdens interstate commerce by prohibiting the sale, possession, or transportation of horsemeat intended for human consumption. Not only are Texans prohibited from possessing or selling such horsemeat, but neither can any person in any other state or in any foreign country possess

or sell it in Texas or even transport it through the state. This is so regardless of where the horse was slaughtered. Thus, the meat from a horse slaughtered in Artesia, New Mexico, for example, cannot legally be transported to DFW airport in north Texas and flown to any domestic or foreign market. The sale of horsemeat for human consumption is legal in the majority of the states in this country.

Again, these statutes burden interstate commerce. Because they do, the next question is whether the burden is clearly excessive in relation to the local benefits. "[T]he extent of the burden that will be tolerated will . . . depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities." *Pike,* 397 U.S. at 142. Defendant claims that any burden on interstate commerce is justified because Texas has a legitimate interest in "criminalizing offensive conduct." (Def.'s Reply at 6.) He further argues that any burden on interstate commerce is outweighed by Texas's interest in preserving horses and preventing the human consumption of horsemeat. Finally, he claims that the statutes are narrowly drawn to prevent the slaughter of horses for human consumption and that, as previously noted, they limit the market for stolen horses. (Def.'s Br. in Supp. of Mot. for Summ. J. at 31.) But if the putative local benefits of these laws is to preserve horses, prevent the human consumption of horsemeat, and prevent horse theft, and assuming that preventing the consumption of Texas horse flesh by all humans everywhere is a legitimate local purpose, the Court concludes that such purposes are not furthered by the statutes. Chapter 149 of the Texas Agriculture Code (and the two challenged sections within it) does not actually prevent the human consumption of horsemeat. Instead it only prohibits the possession,

sale, and transport of horsemeat for human consumption. A person can legally slaughter horses in Texas and eat the meat himself or give it away to others in Texas for their consumption and not be in violation of the statutes. In addition, horses can be, and are, slaughtered in Texas and elsewhere and their meat can be, and is, sold for purposes other than human consumption without violating chapter 149. Again, assuming without deciding the legitimacy of the purported local purposes of chapter 149, it does very little, if anything, to preserve horses, prohibit human consumption of horsemeat, or prevent horse theft. It does, however, make criminals of persons involved in interstate commerce – whether Texans, other Americans, or foreigners – if they sell possess, or transport in Texas what is a legal product almost everywhere else. This is a significant, perhaps even severe, burden on interstate commerce that is "clearly excessive in relation to the putative local benefits." *Houlton,* 175 F.3d at 184, 189.

Even if these statutes were effective in achieving the purposes Defendant suggests, given its significant burden on interstate commerce the Court would be obliged to make a final inquiry: can the purposes of chapter 149 be promoted as well with a lesser impact on interstate commerce? Answering is not a difficult task because the Texas legislature has already answered in part.

Defendant posits that the prevention of horse theft is one of the three bases for chapter 149. But the Texas legislature, perhaps not realizing that chapter 149 had not been repealed or believing it preempted by federal law, enacted the Horse Theft Bill in 1997, requiring slaughterers to pay a fee for each horse bought for slaughter and to account for all horses received. As discussed above, the legislative history of the bill reveals that the legislature

was aware Texas horse slaughterers were shipping meat for human consumption. Clearly, Texas has shown that the prevention of horse theft can be accomplished by less drastic means than by criminalizing the possession and sale of horseflesh intended for human consumption.

Defendant also advances chapter 149 as a codification of Texas's preference for horses and its disfavor of human consumption of horsemeat. Assuming this is so, there must be myriad ways Texas can exalt the beloved equine that is such a storied part of its rich western tradition. It could, and does, support equine research at its agricultural universities. *See, e.g.*, TEX. EDUC. CODE ANN. §§ 88.521-.5232, 88.5245-.527 (Vernon 2002), § 88.524 (Vernon Supp. 2004-05). It could, and does, encourage the humane treatment of horses. *See, e.g.*, TEX. PENAL CODE ANN. § 42.09 (Vernon Supp. 2004-05); TEX. HEALTH & SAFETY CODE ANN. §§ 821.001-.004 (Vernon 2003), §§ 821.021-.025 (Vernon Supp. 2004-05). It could, and does, regulate and license veterinary care for equines. *See, e.g.*, TEX. OCC. CODE ANN. §§ 801.001-.507 (Vernon 2004). It could and does, legalize parimutuel betting on horse races. *See, e.g.*, TEX. REV. CIV. STATE. ANN. art. 179e (Vernon Supp. 2004-05). The fact that Texas does all these things and more provides ample evidence that Texas is able to "preserve horses" without severely or even significantly burdening interstate commerce.

Even Texas's alleged disdain for human consumption of horsemeat can be accommodated without making criminals of those who facilitate it. Education of consumers can be accomplished through Texas's numerous education outlets. Preferences for other meats, poultry, and fish can also be encouraged.

Finally, although Defendant claims that the purpose of chapter 149 is not to protect the health and welfare of Texans,[9] the Court will assume this purpose anyway given that the expressed purpose of the 1945 Meat Inspection Law, from which chapter 149 is derived, was to protect the public health. Even so, the Texas legislature has already demonstrated that such a purpose can be achieved with a lesser impact on interstate commerce. As discussed above, chapter 433 of the Health and Safety Code contains numerous provisions designed to protect the public from unwholesome and mislabeled meat food products.

Chapter 149's burden on interstate commerce significantly outweighs the minimal role it has in preserving horses, preventing the human consumption of horsemeat, preventing the theft of horses, and protecting the public health. And the purposes of chapter 149, assuming Defendant and the Court have correctly identified them, can be promoted as well with a lesser impact on commerce and are not patently unworkable. *Grahnhom*, 125 S. Ct. at 1907. Accordingly, the Court concludes that they violate the dormant commerce clause of the United States Constitution.

IV. ARE SECTIONS 149.002 AND 149.003 PREEMPTED BY FEDERAL LAW?

The preemption doctrine is derived from the Supremacy Clause of the United States Constitution and requires

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[9] The Court finds Defendant's statement interesting given that the express purpose of the 1945 Meat Inspection Law was to protect the public health. The very preamble of the Act states that it is "[a]n Act providing for the protection of the public health." Act of June 4, 1945, 49th Leg., R.S., ch. 339, 1945 Tex. Gen. Laws 554, 554. (Pls.' App. at 32.)

the Court to examine congressional intent. *Fidelity Fed. Sav. & Loan Ass'n v. De la Cuesta,* 458 U.S. 141, 152 (1982). Preemption may be either expressly stated in the statute itself or implicitly contained in its structure and purpose. *Jones v. Rath Packing Co.,* 430 U.S. 519, 529 (1977). If the statute does not contain explicit preemptive language, congressional intent to displace state law may be inferred because "[t]he scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it," because "the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude the enforcement of state laws on the same subject," or because "the object sought to be obtained by federal law and the character of obligations imposed by it may reveal the same purpose." *Rice v. Santa Fe Elevator Corp.,* 331 U.S. 218, 230 (1947). Even if Congress has not totally supplanted a state law, the state law is voided to the extent that it directly conflicts with federal law. *De la Cuesta,* 458 U.S. at 153. This type of conflict arises when "compliance with both federal and state regulations is a physical impossibility." *Fla. Lime & Avocado Growers, Inc. v. Paul,* 373 U.S. 132, 142-43 (1963). It also arises when state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz,* 312 U.S. 52, 67 (1941); *see also Gonzales v. Raich,* 125 S. Ct. 2195, 2212-13 (2005).

Plaintiffs argue that sections 149.002 and 149.003 are preempted by various provisions of federal law. After reviewing the relevant case law, statutory law, and the parties' arguments, the Court agrees. Specifically, the federal Meat Inspection Act allows for and regulates the

slaughter of horses for human consumption.[10] Section 602 of the Meat Inspection Act, which governs its scope, states:

> Meat and meat food products are an important source of the Nation's total supply of food. They are consumed throughout the Nation and the major portion thereof moves in interstate or foreign commerce. It is essential in the public interest that the health and welfare of consumers be protected by assuring that meat and meat food products distributed to them are wholesome, not adulterated, and properly marked, labeled, and packaged. . . . It is hereby found that all articles and animals which are regulated under this chapter are either in interstate or foreign commerce and substantially affect such commerce,

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[10] *See, e.g.*, 21 U.S.C. § 601 (defining "meat food product" as "any product capable of use as human food which is made wholly or in part from any meat or other portion of the carcass of any cattle, sheep, swine, or goats" and stating that this term as applied to food products of equines shall have a comparable meaning); 21 U.S.C. § 603 (requiring "examination and inspection of all . . . horses, mules, and other equines before they shall be allowed to enter into any slaughtering, packing, meat-canning, rendering, or similar establishment, in which they are to be slaughtered and the meat and meat food products thereof are to be used in commerce"); 21 U.S.C. § 604 (requiring "post mortem examination and inspection of the carcasses and parts thereof of all . . . horses, mules, and other equines to be prepared at any slaughtering, meat-canning, salting, packing, rendering, or similar establishment in any State . . . as articles of commerce which are capable of use as human food"); 21 U.S.C. § 606 (requiring "an examination and inspection of all meat food products prepared for commerce in any slaughtering, meat-canning, salting, packing, rendering, or similar establishment"); 21 U.S.C. § 607 (prescribing labeling, marking, and container requirements for "any meat or meat food product prepared for commerce"); 21 U.S.C. § 615 (requiring a "careful inspection of the carcasses and parts thereof of all . . . horses, mules, and other equines, the meat of which . . . is intended and offered for export to any foreign country").

and that regulation by the Secretary and cooperation by the states and other jurisdictions as contemplated by this chapter are appropriate to prevent and eliminate burdens upon such commerce, to effectively regulate such commerce, and to protect the health and welfare of consumers.

21 U.S.C. § 602. Furthermore, § 678 of the Act states:

> Requirements within the scope of this chapter with respect to **premises, facilities and operations of any establishment at which inspection** is provided under subchapter I of this chapter, which are **in addition to, or different** than those made under this chapter may **not** be imposed by any State . . . , except that any such jurisdiction may impose recordkeeping and other requirements within the scope of section 642 of this title, if consistent therewith, with respect to any such establishment. **Marking, labeling, packaging, or ingredient requirements in addition to, or different than,** those made under the chapter may **not** be imposed by any State . . . with respect to articles prepared at any establishment under inspection in accordance with the requirements under subchapter I of this chapter, but any State . . . may, consistent with the requirements under this chapter, exercise concurrent jurisdiction with the Secretary over articles required to be inspected under said subchapter I, for the purpose of preventing the distribution for human food purposes of any such articles which are adulterated or misbranded and are outside of such an establishment, or, in the case of imported articles which are not at such an establishment, after their entry into the United States. This chapter

> shall not preclude any State . . . from making requirement or taking other action, consistent with this chapter, with respect to any other matters regulated under this chapter.

21 U.S.C. § 678 (emphasis supplied).

In Texas, sections 149.002 and 149.003 provide criminal penalties for anyone, including slaughterhouses, who sells, possesses, or transfers horsemeat intended for human consumption. The original purpose behind these sections, as noted above, was to protect the public health. The purpose of the federal Meat Inspection Act is also to protect the public health, and it specifically states that it preempts any state laws that regulate the premises, facilities, or operations of slaughterhouses. Preventing slaughterhouses, such as Plaintiffs, from selling or possessing horsemeat for human consumption or transferring such meat to others who intend to sell it for human consumption is an attempt by Texas to regulate the premises, facilities, and operations of Plaintiffs' slaughterhouses. Consequently, sections 149.002 and 149.003 are preempted by the federal Meat Inspection Act. *See Mario's Butcher Shop & Food Ctr., Inc. v. Armour & Co.*, 574 F. Supp. 653, 655 (N.D. Ill. 1983) (holding, under § 678 of the Meat Inspection Act, that "a state is clearly authorized to enact laws aimed at protecting the health and well being of its citizenry, but . . . such laws may not impose different or additional affirmative requirements upon the product").

V. CONCLUSION

Based on the foregoing, Plaintiffs' Motion for Summary Judgment [doc. # 85-1] is GRANTED. Defendant is hereby PERMANENTLY ENJOINED from prosecuting

Plaintiffs for violating chapter 149 of the Texas Agriculture Code.

Defendant's Motion for Summary Judgment [doc. # 86-1] is DENIED.

SIGNED August 25, 2005.

TRM/ah

/s/ Terry R. Means
TERRY R. MEANS
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 05-11499

MPACADORA DE CARNES DE FRESNILLO SA DE CV; ELTEX CORPORATION; DALLAS CROWN INC

Plaintiffs – Appellees

v.

M CURRY, District Attorney Tarrant County Texas, Et Al

Defendants

M CURRY, District Attorney Tarrant County Texas

Defendant – Appellant

Appeal from the United States District Court for the rthern District of Texas, Fort Worth

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ON PETITION FOR REHEARING EN BANC

(Filed Mar. 05, 2007)

(Opinion 1/19/07, 5 Cir., ___, ___ F.3d ___) Before RKSDALE, BENAVIDES and OWEN, Circuit Judges.

R CURIAM:

Treating the Petition for Rehearing En Banc as a tition for Panel Rehearing, the Petition for Panel hearing is DENIED. No member of the panel nor judge

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in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE
COURT:

/s/ [Illegible]
United States Circuit Judge

SEE FRAP AND LOCAL RULES 41 FOR STAY OF THE MANDATE.

United States Constitution

Article 1, Section 8, Clause 3. Regulation of Commerce

[The Congress shall have Power]

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

Federal Statutes

Packers & Stockyards Act, 7 U.S.C.A. § 182. Definitions

When used in this chapter –

(1) The term "person" includes individuals, partnerships, corporations, and associations;

(2) The term "Secretary" means the Secretary of Agriculture;

(3) The term "meat food products" means all products and byproducts of the slaughtering and meat-packing industry – if edible;

(4) The term "livestock" means cattle, sheep, swine, horses, mules, or goats – whether live or dead;

(5) The term "livestock products" means all products and byproducts (other than meats and meat food products) of the slaughtering and meat-packing industry derived in whole or in part from livestock;

* * *

(11) The term "commerce" means commerce between any State, Territory, or possession, or the District of Columbia, and any place outside thereof; or between points within the same State, Territory, or possession, or the District of

Columbia, but through any place outside thereof; or within any Territory or possession, or the District of Columbia.

Packers & Stockyards Act, 7 U.S.C.A. § 183.

When transaction deemed in commerce; "State" defined

For the purpose of this chapter (but not in anywise limiting the definition in section 182 of this title) a transaction in respect to any article shall be considered to be in commerce if such article is part of that current of commerce usual in the livestock and meat-packing industries, whereby livestock, meats, meat food products, livestock products, dairy products, poultry, poultry products, or eggs, are sent from one State with the expectation that they will end their transit, after purchase, in another, including, in addition to cases within the above general description, all cases where purchase or sale is either for shipment to another State, or for slaughter of livestock within the State and the shipment outside the State of the products resulting from such slaughter. Articles normally in such current of commerce shall not be considered out of such current through resort being had to any means or device intended to remove transactions in respect thereto from the provisions of this chapter. For the purpose of this section the word "State" includes Territory, the District of Columbia, possession of the United States, and foreign nation.

Humane Methods of Slaughter Act, 7 U.S.C.A. § 1901.

Findings and declaration of policy

The Congress finds that the use of humane methods in the slaughter of livestock prevents needless suffering; results in safer and better working conditions for persons engaged in the slaughtering industry; brings about improvement of products and economies in slaughtering operations; and produces other benefits for producers, processors, and consumers which tend to expedite an orderly flow of livestock and livestock products in interstate and foreign commerce. It is therefore declared to be the policy of the United States that the slaughtering of livestock and the handling of livestock in connection with slaughter shall be carried out only by humane methods.

Commercial Transportation of Equine for Slaughter, 7 U.S.C.A. § 1901

Pub.L. 104-127, Title IX, Subtitle A, §§ 901 to 905, Apr. 4, 1996, 110 Stat. 1184, provided that:

"Sec. 901. Findings.

"Because of the unique and special needs of equine being transported to slaughter, Congress finds that it is appropriate for the Secretary of Agriculture to issue guidelines for the regulation of the commercial transportation of equine for slaughter by persons regularly engaged in that activity within the United States.

"Sec. 902. Definitions.

"In this subtitle [this note]:

"(1) **Commercial transportation.** – The term 'commercial transportation' means the regular operation for profit of a transport business that uses trucks, tractors, trailers, or semitrailers, or any combination thereof, propelled or drawn by mechanical power on any highway or public road.

"(2) **Equine for slaughter.** – The term 'equine for slaughter' means any member of the Equidae family being transferred to a slaughter facility, including an assembly point, feedlot, or stockyard.

* * *

"Sec. 903. Regulation of commercial transportation of equine for slaughter.

"(a) **In general.** – Subject to the availability of appropriations, the Secretary of Agriculture may issue guidelines for the regulation of the commercial transportation of equine for slaughter by persons regularly engaged in that activity within the United States.

"(b) **Issues for review.** – In carrying out this section, the Secretary of Agriculture shall review the food, water, and rest provided to equine for slaughter in transit, the segregation of stallions from other equine during transit, and such other issues as the Secretary considers appropriate.

"(c) **Additional authority.** – In carrying out this section, the Secretary of Agriculture may –

"(1) require any person to maintain such records and reports as the Secretary considers necessary;

"(2) conduct such investigations and inspections as the Secretary considers necessary; and

"(3) establish and enforce appropriate and effective civil penalties.

* * *

"Sec. 905. Effective date.

"This subtitle [this note] shall become effective on the first day of the first month that begins 30 days or more after the date of enactment of this Act [Apr. 4, 1996]."

Humane Methods of Slaughter Act, 7 U.S.C.A. § 1902 (2006)

Humane Methods of Slaughter Act, 7 U.S.C.A. § 1902. Humane methods

No method of slaughtering or handling in connection with slaughtering shall be deemed to comply with the public policy of the United States unless it is humane. Either of the following two methods of slaughtering and handling are hereby found to be humane:

(a) in the case of cattle, calves, horses, mules, sheep, swine, and other livestock, all animals are rendered insensible to pain by a single blow or gunshot or an electrical, chemical or other means that is rapid and effective, before being shackled, hoisted, thrown, cast, or cut; or

* * *

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19 U.S.C.A. § 3311

Approval and entry into force of North American Free Trade Agreement

(a) Approval of Agreement and statement of administrative action

Pursuant to section 2903 of this title and section 2191 of this title, the Congress approves –

(1) the North American Free Trade Agreement entered into on December 17, 1992, with the Governments of Canada and Mexico and submitted to the Congress on November 4, 1993; and

(2) the statement of administrative action proposed to implement the Agreement that was submitted to the Congress on November 4, 1993.

(b) Conditions for entry into force of Agreement

The President is authorized to exchange notes with the Government of Canada or Mexico providing for the entry into force, on or after January 1, 1994, of the Agreement for the United States with respect to such country at such time as –

(1) the President –

(A) determines that such country has implemented the statutory changes necessary to bring that country into compliance with its obligations under the Agreement and has made provision to implement the Uniform Regulations provided for under article 511 of the Agreement regarding the interpretation, application, and administration of the rules of origin, and

(B) transmits a report to the House of Representatives and the Senate setting forth the determination under subparagraph (A) and including, in the case of Mexico, a description of the specific measures taken by that country to –

(i) bring its laws into conformity with the requirements of the Schedule of Mexico in Annex 1904.15 of the Agreement, and (ii) otherwise ensure the effective implementation of the binational panel review process under chapter 19 of the Agreement regarding final antidumping and countervailing duty determinations; and

(2) the Government of such country exchanges notes with the United States providing for the entry into force of the North American Agreement on Environmental Cooperation and the North American Agreement on Labor Cooperation for that country and the United States.

Federal Meat Inspection Act, 21 U.S.C.A. § 601– Definitions

As used in this chapter, except as otherwise specified, the following terms shall have the meanings stated below:

(a) The term "Secretary" means the Secretary of Agriculture of the United States or his delegate.

* * *

(c) The term "meat broker" means any person, firm, or corporation engaged in the business of buying or selling carcasses, parts of carcasses, meat, or meat food products of cattle, sheep, swine, goats, horses, mules, or other equines on commission, or otherwise negotiating purchases or sales of such articles other than for his own

account or as an employee of another person, firm, or corporation.

* * *

(e) The term "animal food manufacturer" means any person, firm, or corporation engaged in the business of manufacturing or processing animal food derived wholly or in part from carcasses, or parts or products of the carcasses, of cattle, sheep, swine, goats, horses, mules, or other equines.

* * *

(h) The term "commerce" means commerce between any State, any Territory, or the District of Columbia, and any place outside thereof; or within any Territory not organized with a legislative body, or the District of Columbia.

(i) The term "United States" means the States, the District of Columbia, and the Territories of the United States.

(j) The term "meat food product" means any product capable of use as human food which is made wholly or in part from any meat or other portion of the carcass of any cattle, sheep, swine, or goats, excepting products which contain meat or other portions of such carcasses only in a relatively small proportion or historically have not been considered by consumers as products of the meat food industry, and which are exempted from definition as a meat food product by the Secretary under such conditions as he may prescribe to assure that the meat or other portions of such carcasses contained in such product are not adulterated and that such products are not represented as meat food products. This term as applied to food products of equines shall have a meaning comparable to

that provided in this paragraph with respect to cattle, sheep, swine, and goats.

(k) The term "capable of use as human food" shall apply to any carcass, or part or product of a carcass, of any animal, unless it is denatured or otherwise identified as required by regulations prescribed by the Secretary to deter its use as human food, or it is naturally inedible by humans.

(l) The term "prepared" means slaughtered, canned, salted, rendered, boned, cut up, or otherwise manufactured or processed.

(m) The term "adulterated" shall apply to any carcass, part thereof, meat or meat food product under one or more of the following circumstances:

* * *

(n) The term "misbranded" shall apply to any carcass, part thereof, meat or meat food product under one or more of the following circumstances:

(1) if its labeling is false or misleading in any particular; (2) if it is offered for sale under the name of another food; (3) if it is an imitation of another food, unless its label bears, in type of uniform size and prominence, the word "imitation" and immediately thereafter, the name of the food imitated; (4) if its container is so made, formed, or filled as to be misleading;

* * *

(o) The term "label" means a display of written, printed, or graphic matter upon the immediate container (not including package liners) of any article.

(p) The term "labeling" means all labels and other written, printed, or graphic matter (1) upon any article or any of its containers or wrappers, or (2) accompanying such article.

* * *

(s) The term "official mark" means the official inspection legend or any other symbol prescribed by regulations of the Secretary to identify the status of any article or animal under this chapter.

(t) The term "official inspection legend" means any symbol prescribed by regulations of the Secretary showing that an article was inspected and passed in accordance with this chapter.

(u) The term "official certificate" means any certificate prescribed by regulations of the Secretary for issuance by an inspector or other person performing official functions under this chapter.

(v) The term "official device" means any device prescribed or authorized by the Secretary for use in applying any official mark.

(w) The term "amenable species" means –

(1) those species subject to the provisions of this Act on the day before November 10, 2005; and

(2) any additional species of livestock that the Secretary considers appropriate.

Federal Meat Inspection Act, 21 U.S.C.A. § 602.

Congressional statement of findings

Meat and meat food products are an important source of the Nation's total supply of food. They are consumed throughout the Nation and the major portion thereof moves in interstate or foreign commerce. It is essential in the public interest that the health and welfare of consumers be protected by assuring that meat and meat food products distributed to them are wholesome, not adulterated, and properly marked, labeled, and packaged. Unwholesome, adulterated, or misbranded meat or meat food products impair the effective regulation of meat and meat food products in interstate or foreign commerce, are injurious to the public welfare, destroy markets for wholesome, not adulterated, and properly labeled and packaged meat and meat food products, and result in sundry losses to livestock producers and processors of meat and meat food products, as well as injury to consumers. The unwholesome, adulterated, mislabeled, or deceptively packaged articles can be sold at lower prices and compete unfairly with the wholesome, not adulterated, and properly labeled and packaged articles, to the detriment of consumers and the public generally. It is hereby found that all articles and animals which are regulated under this chapter are either in interstate or foreign commerce or substantially affect such commerce, and that regulation by the Secretary and cooperation by the States and other jurisdictions as contemplated by this chapter are appropriate to prevent and eliminate burdens upon such commerce, to effectively regulate such commerce, and to protect the health and welfare of consumers.

Federal Meat Inspection Act, 21 U.S.C.A. § 603

Inspection of meat and meat food products

(a) Examination of animals before slaughtering; diseased animals slaughtered separately and carcasses examined

For the purpose of preventing the use in commerce of meat and meat food products which are adulterated, the Secretary shall cause to be made, by inspectors appointed for that purpose, an examination and inspection of all amenable species before they shall be allowed to enter into any slaughtering, packing, meat-canning, rendering, or similar establishment, in which they are to be slaughtered and the meat and meat food products thereof are to be used in commerce; and all amenable species found on such inspection to show symptoms of disease shall be set apart and slaughtered separately from all other amenable species, and when so slaughtered the carcasses of said amenable species shall be subject to a careful examination and inspection, all as provided by the rules and regulations to be prescribed by the Secretary, as provided for in this subchapter.

(b) Humane methods of slaughter

For the purpose of preventing the inhumane slaughtering of livestock, the Secretary shall cause to be made, by inspectors appointed for that purpose, an examination and inspection of the method by which amenable species are slaughtered and handled in connection with slaughter in the slaughtering establishments inspected under this chapter. The Secretary may refuse to provide inspection to a new slaughtering establishment or may cause inspection to be temporarily suspended at a slaughtering establishment if the Secretary finds that any amenable species

have been slaughtered or handled in connection with slaughter at such establishment by any method not in accordance with the Act of August 27, 1958 (72 Stat. 862; 7 U.S.C. 1901-1906) until the establishment furnishes assurances satisfactory to the Secretary that all slaughtering and handling in connection with slaughter of livestock shall be in accordance with such a method.

Federal Meat Inspection Act, 21 U.S.C.A. § 610 – Prohibited acts

No person, firm, or corporation shall, with respect to any cattle, sheep, swine, goats, horses, mules, or other equines, or any carcasses, parts of carcasses, meat or meat food products of any such animals –

(a) Slaughtering animals or preparation of articles capable of use as human food

slaughter any such animals or prepare any such articles which are capable of use as human food at any establishment preparing any such articles for commerce, except in compliance with the requirements of this chapter;

(b) Humane methods of slaughter

slaughter or handle in connection with slaughter any such animals in any manner not in accordance with the Act of August 27, 1958 (72 Stat. 862; 7 U.S.C. 1901-1906);

(c) Sales, transportation, and other transactions

sell, transport, offer for sale or transportation, or receive for transportation, in commerce, (1) any such articles which (A) are capable of use as human food and (B) are adulterated or misbranded at the time of such sale, transportation,

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offer for sale or transportation, or receipt for transportation; or (2) any articles required to be inspected under this subchapter unless they have been so inspected and passed;

(d) Adulteration or misbranding

do, with respect to any such articles which are capable of use as human food, any act while they are being transported in commerce or held for sale after such transportation, which is intended to cause or has the effect of causing such articles to be adulterated or misbranded.

Federal Meat Inspection Act, 21 U.S.C.A. § 615

Inspection of carcasses, meat of which is intended for export

The Secretary shall also cause to be made a careful inspection of the carcasses and parts thereof of all amenable species, the meat of which, fresh, salted, canned, corned, packed, cured, or otherwise prepared, is intended and offered for export to any foreign country, at such times and places and in such manner as he may deem proper.

Federal Meat Inspection Act, 21 U.S.C.A. § 616

Inspectors of carcasses, etc., meat of which is intended for export; certificates of condition

For the purpose of section 615 of this title the Secretary may appoint inspectors who shall be authorized to give an official certificate stating the condition in which said cattle, sheep, swine, goats, horses, mules, or other equines, and the meat thereof, are found.

Federal Meat Inspection Act, 21 U.S.C.A. § 617

Clearance prohibited to vessel carrying meat for export without inspector's certificate

No clearance shall be given to any vessel having on board any fresh, salted, canned, corned, or packed beef, mutton, pork, goat or equine meat for export to and sale in a foreign country from any port in the United States, until the owner or shipper thereof shall obtain from an inspector appointed under the provisions of this chapter a certificate that the said amenable species were sound and healthy at the time of inspection, and that their meat is sound and wholesome, unless the Secretary shall have waived the requirements of such certificate for the country to which said amenable species or meats are to be exported.

Federal Meat Inspection Act, 21 U.S.C.A. § 619

Marking, labeling, or other identification of kinds of animals or articles' derivation; separate establishments for preparation and slaughtering activities

No person, firm, or corporation shall sell, transport, offer for sale or transportation, or receive for transportation, in commerce, any carcasses of species designated by regulations in effect on the day before November 10, 2005 or parts of such carcasses, or the meat or meat food products thereof, unless they are plainly and conspicuously marked or labeled or otherwise identified as required by regulations prescribed by the Secretary to show the kinds of animals from which they were derived. When required by the Secretary, with respect to establishments at which inspection is maintained under this subchapter, such animals and their carcasses, parts thereof, meat and meat

food products shall be prepared in establishments separate from those in which other amenable species are slaughtered or their carcasses, parts thereof, meat or meat food products are prepared.

Federal Meat Inspection Act, 21 U.S.C.A. § 620 - Imports

(a) Adulteration or misbranding prohibition; compliance with inspection, building construction standards, and other provisions; humane methods of slaughter; treatment as domestic articles subject to this chapter and food, drug, and cosmetic provisions; marking and labeling; personal consumption exemption

No carcasses, parts of carcasses, meat or meat food products of amenable species which are capable of use as human food, shall be imported into the United States if such articles are adulterated or misbranded and unless they comply with all the inspection, building, construction standards, and all other provisions of this chapter and regulations issued thereunder applicable to such articles in commerce within the United States. No such carcasses, parts of carcasses, meat or meat food products shall be imported into the United States unless the livestock from which they were produced was slaughtered and handled in connection with slaughter in accordance with the Act of August 27, 1958 (72 Stat. 862; 7 U.S.C. 1901-1906). All such imported articles shall, upon entry into the United States, be deemed and treated as domestic articles subject to the other provisions of this chapter and the Federal Food, Drug, and Cosmetic Act [21 U.S.C.A. § 301 et seq.]: Provided, That they shall be marked and labeled as required by such regulations for imported articles: *Provided further*, That

nothing in this section shall apply to any individual who purchases meat or meat products outside the United States for his own consumption except that the total amount of such meat or meat products shall not exceed fifty pounds.

* * *

Federal Meat Inspection Act, 21 U.S.C.A. § 678

Non-Federal jurisdiction of federally regulated matters; prohibition of additional or different requirements for establishments with inspection services and as to marking, labeling, packaging, and ingredients; recordkeeping and related requirements; concurrent jurisdiction over distribution for human food purposes of adulterated or misbranded and imported articles; other matters

Requirements within the scope of this chapter with respect to premises, facilities and operations of any establishment at which inspection is provided under subchapter I of this chapter, which are in addition to, or different than those made under this chapter may not be imposed by any State or Territory or the District of Columbia, except that any such jurisdiction may impose recordkeeping and other requirements within the scope of section 642 of this title, if consistent therewith, with respect to any such establishment. Marking, labeling, packaging, or ingredient requirements in addition to, or different than, those made under this chapter may not be imposed by any State or Territory or the District of Columbia with respect to articles prepared at any establishment under inspection in accordance with the requirements under subchapter I of this chapter, but any State or Territory or the District of

Columbia may, consistent with the requirements under this chapter, exercise concurrent jurisdiction with the Secretary over articles required to be inspected under said subchapter I, for the purpose of preventing the distribution for human food purposes of any such articles which are adulterated or misbranded and are outside of such an establishment, or, in the case of imported articles which are not at such an establishment, after their entry into the United States. This chapter shall not preclude any State or Territory or the District of Columbia from making requirement or taking other action, consistent with this chapter, with respect to any other matters regulated under this chapter.

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49 U.S.C.A. § 14501. Federal authority over intrastate transportation

(b) Freight forwarders and brokers. –

(1) General rule. – Subject to paragraph (2) of this subsection, no State or political subdivision thereof and no intrastate agency or other political agency of 2 or more States shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law relating to intrastate rates, intrastate routes, or intrastate services of any freight forwarder or broker.

(c) Motor carriers of property. –

(1) General rule. – Except as provided in paragraphs (2) and (3), a State, political subdivision of a State, or political authority of 2 or more States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier (other than a carrier affiliated with a

direct air carrier covered [illegible] section 41713(b)(4)) or any motor private carrier, broker, or freight forwarder with respect to the transportation of property.

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49 U.S.C. § 41713. – Preemption of authority over prices, routes, and service

(a) Definition. – In this section, "State" means a State, the District of Columbia, and a territory or possession of the United States.

(b) Preemption. – (1) Except as provided in this subsection, a State, political subdivision of a State, or political authority of at least 2 States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier that may provide air transportation under this subpart.

* * *

(4) Transportation by air carrier or carrier affiliated with a direct air carrier. –

(A) General rule. – Except as provided in subparagraph (B), a State, political subdivision of a State, or political authority of 2 or more States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier or carrier affiliated with a direct air carrier through common controlling ownership when such carrier is transporting property by aircraft or by motor vehicle (whether or not such property has had or will have a prior or subsequent air movement).

* * *

Federal Regulations

9 C.F.R. § 94.15– Animal products and materials; movement and handling.

(a) Any animal product or material which would be eligible for entry into the United States, as specified in the regulations in this part, may transit through the United States for immediate export if the following conditions are met:

(1) Notification of the transiting of such animal product or material must be made by the importer to the Plant Protection and Quarantine Officer at the United States port of arrival prior to such transiting, and

(2) The animal product or material transited shall be contained in a sealed, leakproof carrier or container which shall remain sealed while aboard the transporting carrier or other means of conveyance, or if the container or carrier in which such animal product or material is transported is offloaded in the United States for reshipment, it shall remain sealed at all times.

* * *

(e) Any meat or other animal products not otherwise eligible for entry into the United States, as provided in this part and part 95 of this chapter, may transit the United States for immediate export if the following conditions are met:

(1) Notification of the transiting of such meat or other animal product is made by the importer to the Plant Protection and Quarantine officer at the United States port of arrival prior to such transiting;

(2) The meat or other animal product is contained in a sealed, leakproof carrier or container, which remains sealed while aboard the transporting carrier or other means of conveyance, or, if the container or carrier in which the meat or other animal product is transported is offloaded in the United States for reshipment, it remains sealed at all times;

(3) Such transit is limited to the maritime or airport port of arrival only, with no overland movement outside the airport terminal area or dock area of the maritime port; and

(4) The meat or other animal product is not held or stored for more than 72 hours at the maritime or airport port of arrival.

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9 C.F.R. § 302.3 – Livestock and products entering official establishments.

All livestock and all products entering any official establishment and all products prepared, in whole or in part, therein, shall be inspected, handled, stored, prepared, packaged, marked, and labeled as required by the regulations in this subchapter.

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9 C.F.R. § 305.2 – Separation of official establishments.

(a) Each official establishment shall be separate and distinct from any unofficial establishment except a poultry products processing establishment operated under Federal inspection under the Poultry Products Inspection Act or under State inspection.

(b) The slaughter or other preparation of products of horses, mules, or other equines required to be conducted under inspection pursuant to the regulations in this subchapter shall be done in establishments separate from any establishment in which cattle, sheep, swine, or goats are slaughtered or their products are prepared.

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9 C.F.R. § 312.1 General.

The marks, devices, and certificates prescribed or referenced in this part shall be official marks, devices, and certificates for purposes of the Act, and shall be used in accordance with the provisions of this part and the regulations cited therein.

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9 C.F.R. § 312.8 Official export inspection marks, devices, and certificates.

(a) The official export meat inspection mark required by Part 322 of this subchapter shall be in the following form as hereinafter specified:

Any rubber stamp approved by the Administrator, in the manner provided for in Part 317 of this subchapter, and bearing the official mark prescribed in this paragraph shall be an official device for the purposes of the Act.

(b) The official export certificate required by Part 322 of this subchapter is a paper certificate form for signature by a Program employee, bearing a letterhead and the seal of the United States Department of Agriculture, with a certification that meat or meat food products described on the form is from animals that received ante-mortem and post-mortem inspection and were found sound and healthy

and that it has been inspected and passed as provided by law and the regulations of the Department of Agriculture and is sound and wholesome. The certificate also bears a serial number such as "No. 184432."

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9 C.F.R. § 313.15 Mechanical; captive bolt.

The slaughtering of sheep, swine, goats, calves, cattle, horses, mules, and other equines by using captive bolt stunners and the handling in connection therewith, in compliance with the provisions contained in this section, are hereby designated and approved as humane methods of slaughtering and handling of such animals under the Act.

* * *

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9 C.F.R. § 352.19 – Ante-mortem inspection and applicable requirements.

Notwithstanding part 309 of this subchapter, an official establishment that wishes to slaughter horses can apply for voluntary ante-mortem inspection according to § 352.3. Such establishments shall pay the applicable base time, overtime, and holiday rates for ante-mortem inspection in accordance with § 352.5. Such ante-mortem inspection shall be made in pens on the premises of the establishment at which the horses are offered for slaughter in accordance with § 309.1(b), and such establishments also shall comply with all applicable provisions of §§ 352.8 and 352.9. If the establishment complies with all these requirements for ante-mortem inspection, FSIS will conduct ante-mortem inspection at that establishment in accordance with § 352.10, and all other provisions in part 309 of

this subchapter that pertain to horses will apply. FSIS may deny or withdraw ante-mortem inspection services at official establishments that slaughter horses for any applicable reason under § 352.6. Official marks and devices to identify inspected and passed horse carcasses and parts of carcasses, or horse meat food products shall be those in § 312.3 of this subchapter.

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9 C.F.R. § 322.1 Manner of affixing stamps and marking products for export.

(a) The outside container (including cloth wrappings) of any inspected and passed product for export, except ship stores, small quantities exclusively for the personal use of the consignee and not for sale or distribution, and shipments by and for the U.S. Armed Forces, shall be marked with an official export stamp, as shown in § 312.8 of this subchapter, bearing the number of the export certificate.

* * *

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9 C.F.R. § 322.2 Export certificates; instructions concerning issuance.

(a) Upon application of the exporter, the inspector in charge is authorized to issue official export certificates for shipments of inspected and passed product to any foreign country. Certificates should be issued at the time the products leave the official establishment; if not issued at that time they may be issued later only after identification and reinspection of the products.

(b) Official export certificates shall be issued with serial numbers and in triplicate form. Quadruplicate certificates

may be issued for any exportation on request of the exporter. Each certificate shall show the names of the exporter and the consignee, the destination, the number and types of packages, the shipping marks, the kinds of products, and the weight of the products in accordance with § 317.2 of this subchapter.

* * *

(d) The original of the certificate shall be delivered to the shipper and may be furnished by him to the consignee for purposes of effecting the entry of product into the foreign country of destination.

Texas Statutes and Regulations

Tex. Agric. Code Ann. § 148.029 (Vernon 2004)
Fee for Horses Sold to Slaughterer

(a) A slaughterer shall pay the following fees for each horse purchased for slaughter:

(1) $2 to the Texas Agricultural Extension Service; and

(2) $3 to the department, agency, or association authorized and designated by the secretary of agriculture of the United States to inspect livestock in Texas under 7 U.S.C. Section 217a.

(b) The slaughterer shall remit the fees required by Subsection (a) on a weekly basis.

Tex. Agric. Code Ann. § 148.030 (Vernon 2004)

Inspection of Horses Sold Through Certain Slaughterhouses

The department, agency, or association authorized to inspect livestock under 7 U.S.C. Section 217a shall inspect for identification purposes each horse held, handled, purchased, or sold through a slaughterhouse.

Tex. Agric. Code Ann. § 149.001 (Vernon 2004)

Definition

In this chapter, "horsemeat" means the flesh of an animal of the genus equus.

Tex. Agric. Code Ann. § 149.002 (Vernon 2004) – Sale or Possession of Horsemeat

A person commits an offense if:

(1) the person sells, offers for sale, or exhibits for sale horsemeat as food for human consumption; or (2) the person possesses horsemeat with the intent to sell the horsemeat as food for human consumption.

Tex. Agric. Code Ann. § 149.003 (Vernon 2004) – Transfer of Horsemeat

A person commits an offense if the person:

(1) transfers horsemeat to a person who intends to sell the horsemeat, offer or exhibit it for sale, or possess it for sale as food for human consumption; and

(2) knows or in the exercise of reasonable discretion should know that the person receiving the horsemeat intends to sell the horsemeat, offer or exhibit it for sale, or possess it for sale as food for human consumption.

Tex. Agric. Code Ann. § 149.004 (Vernon 2004) – Prima Facie Evidence of Offense

In a prosecution under this chapter, any of the following is prima facie evidence of an offense:

(1) the presence of horsemeat in a retail store in which the meat of cattle, sheep, goats, or hogs is exhibited or kept for sale, unless the horsemeat is in a package or container of not more than five pounds and is plainly labeled "horsemeat";

(2) the presence of horsemeat in the wholesaler's establishment, warehouse, meat locker, meat cooler, or other place of storage or handling of the meat of cattle, sheep, goats, or hogs, unless the horsemeat is in a package or container of not more than five pounds and is plainly labeled "horsemeat";

(3) the presence of horsemeat mixed or commingled with the meat of cattle, sheep, goats, or hogs in hamburger, sausage, or other processed meat products;

(4) the transportation of horsemeat between the hours of 10 p.m. and 4 a.m., unless the horsemeat is in individual packages or containers of not more than five pounds and is plainly labeled "horsemeat";

(5) the presence of horsemeat in or the delivery or attempted delivery of horsemeat to a restaurant or cafe; and

(6) the presence of horsemeat in or the delivery or attempted delivery of horsemeat to an establishment that prepares, cans, or processes food products for human consumption from the meat of cattle, sheep, goats, or hogs.

Tex. Agric. Code Ann. § 149.005 (Vernon 2004) – Penalty

(a) An offense under this chapter is punishable by:

(1) a fine of not more than $1,000;

(2) confinement in jail for not less than 30 days nor more than two years; or

(3) both the fine and confinement.

(b) A second or subsequent offense under this chapter is punishable by imprisonment in the institutional division

of the Texas Department of Criminal Justice for not less than two years nor more than five years.

Tex. Agric. Code Ann. § 149.006 (Vernon 2004) – Injunction

On a conviction of an offense under this chapter, the court shall enjoin the defendant from slaughtering animals, selling meat, transporting meat, or in any manner purveying meat to the public as food for human consumption. Each day the injunction is violated constitutes a separate contempt.

Tex. Agric. Code Ann. § 149.007 (Vernon 2004) – Effect on Municipal Ordinances

(a) Except as provided by Subsection (b) of this section, this chapter does not affect any provision of a municipal ordinance regulating the sale or possession of horsemeat or the licensing of horsemeat dealers.

(b) A municipal ordinance that directly conflicts with this chapter has no effect.

Tex. Agric. Code Ann. § 152.001 (Vernon 2004) – Training Program for Horse Owners

(a) The Texas Agricultural Extension Service shall develop an ongoing training program for horse owners to promote the prevention of horse theft. The program must include information on visible, permanent identification of horses and other security measures to prevent horse theft.

(b) A county office of the Texas Agricultural Extension Service periodically shall notify horse owners of the training program through public service announcements or other means.

Tex. Agric. Code Ann. § 152.002 (Vernon 2004) Training Program for Law Enforcement Agencies

(a) A state, county, or local law enforcement agency with responsibility for investigating horse thefts shall provide training for its employees likely to handle horse theft cases regarding:

(1) state laws on horse theft; (2) resources available for investigating horse thefts; (3) communication about horse theft with other law enforcement agencies; and (4) identification of missing horses.

(b) To facilitate greater communication between law enforcement agencies in horse theft cases, state, county, and local law enforcement agencies shall, to the greatest extent possible, use the Texas Crime Information Center (TCIC) and the National Crime Information Center (NCIC) in reporting and investigating horse thefts.

Texas Meat and Poultry Inspection Act, Tex. Health & Safety Code, Chap. 433

Tex. Health & Safety Code Ann. § 433.001 (Vernon 2001) - Short Title

This chapter may be cited as the Texas Meat and Poultry Inspection Act.

Tex. Health & Safety Code Ann. § 433.002 (Vernon 2001) – Policy

(a) Meat and meat food products are an important source of the nation's total food supply. It is essential in the public interest that the health and welfare of consumers be protected by assuring that meat and meat food products distributed to them are wholesome, unadulterated, and properly marked, labeled, and packaged. Unwholesome, adulterated, or misbranded meat or meat food products:

(1) injure the public welfare; (2) destroy markets for wholesome, unadulterated, and properly labeled and packaged meat and meat food products; (3) cause losses to livestock producers and processors of meat and meat food products; (4) cause injury to consumers; and (5) can be sold at lower prices and compete unfairly with wholesome, unadulterated, and properly labeled and packaged articles, to the detriment of consumers and the public.

(b) Regulation by the commissioner and cooperation by this state and the United States as provided by this chapter are appropriate to protect the health and welfare of consumers and otherwise accomplish the purposes of this chapter.

Tex. Health & Safety Code Ann. § 433.003 (Vernon 2001) – Definitions

In this chapter:

(1) "Animal food manufacturer" means a person in the business of manufacturing or processing animal food any part of which is derived from a carcass, or a part or product of a carcass, of livestock.

(2) "Capable of use as human food" means:

(A) not naturally inedible by humans; or (B) not denatured or otherwise identified as required by rule of the commissioner to deter its use as human food.

* * *

(5) "Exotic animal" means a member of a species of game not indigenous to this state, including an axis deer, nilga antelope, red sheep, or other cloven-hooved ruminant animal.

* * *

(7) "Inedible animal product" means a product, other than a meat food product, any part of which is made from a carcass, or a part or product of a carcass, of livestock.

(8) "Interstate commerce" means commerce between this state and:

(A) another state of the United States; or (B) a foreign country.

(9) "Label" means a display of written, printed, or other graphic matter on the product or the immediate container, other than a package liner, of an article.

(10) "Labeling" means:

(A) a label; or (B) other written, printed, or graphic material on an article or any container or wrapper of an article, or accompanying an article.

(11) "Livestock" means cattle, bison, sheep, swine, goats, horses, mules, other equines, poultry, domestic rabbits, exotic animals, or domesticated game birds.

* * *

(13) "Meat food product" means a product that is capable of use as human food and that is made in whole or part from meat or other portion of the carcass of livestock, except a product that:

(A) contains meat or other portions of the carcass only in a relatively small proportion or that historically has not been considered by consumers as a product of the meat food industry; and

(B) is exempted from the definition of meat food product by the commissioner under conditions that the commissioner prescribes to assure that the meat or other portions of the carcass contained in the product are unadulterated and that the product is not represented as a meat food product.

* * *

(16) "Official establishment" means an establishment designated by the commissioner at which inspection of the slaughter of livestock or the preparation of livestock products is maintained under this chapter.

* * *

(22) "Prepared" means slaughtered, canned, salted, rendered, boned, cut up, stuffed, or manufactured or processed in any other manner.

(23) "Processing establishment" means a slaughtering, packing, meat-canning, or rendering establishment or a similar establishment.

* * *

Tex. Health & Safety Code Ann. § 433.007 (Vernon 2001) – Construction with Other Law

(a) This chapter prevails over any other law, including Chapter 431 (Texas Food, Drug, and Cosmetic Act), to the extent of any conflict.

(b) This chapter applies to a person, establishment, animal, or article regulated under the Federal Meat Inspection Act (21 U.S.C. Section 601 et seq.) or the Federal Poultry Products Inspection Act (21 U.S.C. Section 451 et seq.).

Tex. Health & Safety Code Ann. § 433.033 (Vernon 2001) – Equine Products

A person may not sell, transport, offer for sale or transportation, or receive for transportation, in intrastate commerce, a carcass, part of a carcass, meat, or a meat food product of a horse, mule, or other equine unless the article is plainly and conspicuously marked or labeled or otherwise identified, as required by rule of the commissioner, to show the kind of animal from which the article was derived. The commissioner may require an establishment at which inspection is maintained under this chapter to prepare those articles in an establishment separate from one in which livestock other than equines is slaughtered or carcasses, parts of carcasses, meat, or meat food products of livestock other than equines are prepared.

Texas Penal Code § 42.09 – Cruelty to Animals

(a) A person commits an offense if the person intentionally or knowingly:

(1) tortures an animal;

(2) fails unreasonably to provide necessary food, care, or shelter for an animal in the person's custody;

(4) transports or confines an animal in a cruel manner;

(5) kills, seriously injures, or administers poison to an animal, other than cattle, horses, sheep, swine, or goats, belonging to another without legal authority or the owner's effective consent;

(8) trips a horse;

(9) injures an animal, other than cattle, horses, sheep, swine, or goats, belonging to another without legal authority or the owner's effective consent;

* * * * *

(i) An offense under Subsection (a)(1), (5), (6), (7), or (8) is a state jail felony, except that the offense is a felony of the third degree if the person has previously been convicted two times under this section.

Texas Administrative Code
Title 4, Agriculture, Chapter 49 – Equine

4 Tex. Admin. Code § 49.3 – Requirements for Dealer Recordkeeping

(a) A dealer is defined as a person engaged in the business of buying or selling animals in commerce:

(1) On the person's own account; (2) As an employee or agent of the vendor, the purchaser, or both; or (3) On a commission basis.

(b) A dealer as defined in subsection (a) of this section does not include a person who buys or sells animals as part of the person's bona fide breeding, feeding or stocker operations, but does include livestock markets and commission merchants.

(c) Any dealer must maintain records of equine purchased and sold. Such records shall show the buyer's and seller's name and address, county of origin, number of animals, and a description of each animal, including sex, age, color and color markings, registration number, if any, and any individual identification such as tattoo, brand, or microchip number. Records at auctions and commission firms shall show the delivery vehicle license number. All dealer records must be maintained for a minimum of two years after the date of the transaction.

(d) Slaughter buyers. A slaughter buyer is someone who buys an equine on their own account, as an employee or agent of a slaughter facility, or on a commission basis for the purpose of being slaughtered. A slaughter buyer must maintain records required under subsection (c) of this section, which includes the VS Form 1-27 permit number and the name of the person who issued it.

Chapter 51 – Entry Requirements

4 Tex. Admin. Code § 51.1. Definitions

The following words and terms, when used in this chapter, shall have the following meanings, unless the context clearly indicates otherwise:

(1) Accredited veterinarian – A licensed veterinarian who is approved to perform specified functions required by cooperative state-federal disease control and eradication programs pursuant to Title 9 of the Code of Federal Regulations, Parts 160 and 161.

(2) Animal – Includes livestock, exotic livestock, domestic fowl, and exotic fowl.

* * *

(6) Commission – The Texas Animal Health Commission.

* * *

(10) Equine interstate passport – A document signed by an accredited veterinarian that shows the equine listed were inspected, subjected to tests, immunizations and treatment as required by the issuing state animal health agency, and contains a description of the equine listed. The passport is valid for six months when accompanied by proof of an official negative EIA test within the previous six months. Permanent individual animal identification in the form of a lip tattoo, brand or electronic implant is required for all equine approved for the equine interstate passport. This document is valid for equine entering from any state that has entered into a written agreement to reciprocate with Texas.

(11) Equine identification card – A document signed by the owner and a brand inspector or authorized state animal regulatory agency representative that lists the animal's name and description and indicates the location of all identifying marks or brands. This document is valid for equine entering from any state which has entered into a written agreement to reciprocate with Texas.

* * *

(14) Livestock – cattle, horses, mules, asses, sheep, goats, and hogs.

* * *

(16) Permit – A document recognized by the commission with specified conditions relative to movement, testing and vaccinating of animal which is required to accompany the animal entering, leaving or moving within the State of Texas.

* * *

(18) Waybill – A document used for livestock moving directly to a USDA specifically approved livestock market, quarantined feedlot, or slaughter plant or a document used for poultry moving directly to a federally inspected slaughter plant. The waybill contains the following information:

(A) name and address of owner or shipper;

(B) point of origin;

(C) number and type of livestock and/or poultry;

(D) purpose of movement; and

(E) destination.

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4 Tex Admin. Code § 51.13. Equine

(a) Equine infectious anemia (EIA) requirements. All horses, mules, asses, ponies, zebras and all other equidae shall have a certificate of veterinary inspection and proof of a negative EIA test within the previous 12 months prior to entering Texas. The negative test results together with

the name of the laboratory conducting the test must be shown on the certificate of veterinary inspection. Alternatively, a completed VS Form 10-11 (Equine Infectious Anemia Laboratory Test) may be attached to the certificate of veterinary inspection. Only test results from USDA-approved laboratories are acceptable. Exceptions to these test requirements are:

(1) equidae consigned directly to an approved slaughtering establishment accompanied by a prior permit issued by the Texas Animal Health Commission;

(2) equidae that have been "S" branded and consigned directly to an approved slaughter establishment accompanied by a VS 1-27 permit;

(3) equidae may enter Texas when consigned directly to a veterinary hospital or clinic for treatment or for usual veterinary procedures when accompanied by a permit number issued by the Texas Animal Health Commission. Following release by the veterinarian, equidae must be returned immediately to the state of origin by the most direct route;

(4) equidae may enter Texas for shows, fairs, exhibitions or assembly purposes when accompanied by a valid equine interstate passport or equine identification card and a completed VS form 10-11 showing negative results to an official EIA test within the previous six months.

(5) equidae entering for consignment to a livestock market, may first move directly to an EIA approved lab/vet clinic for testing. The animal must be accompanied by a prior entry permit issued by the Texas Animal Health Commission.

Title 25, Health Services, Chapter 221 – Meat Safety Assurance

25 TX ADC § 221.11. Federal Regulations on Meat and Poultry Inspection

(a) The department adopts by reference the following federal requirements in the Code of Federal Regulations (CFR), as amended:

(1) 9 CFR, Part 301, "Definitions";

(2) 9 CFR, Part 303, except 303.1(a) and (b), "Exemptions";

(3) 9 CFR, Part 304, "Application for inspection; grant of inspection";

(4) 9 CFR, Part 305, "Official numbers; inauguration of inspection; withdrawal of inspection; reports of violation";

(5) 9 CFR, Part 306, "Assignment and authorities of program employees";

(6) 9 CFR, Part 307, "Facilities for inspection";

(7) 9 CFR, Part 309, "Ante-mortem inspection";

(8) 9 CFR, Part 310, "Post-mortem inspection";

(9) 9 CFR, Part 311, "Disposal of diseased or otherwise adulterated carcasses and parts";

(10) 9 CFR, Part 312, "Official marks, devices, and certificates";

(11) 9 CFR, Part 313, "Humane slaughter of livestock";

(12) 9 CFR, Part 314, "Handling and disposal of condemned or other inedible products at official establishments";

(13) 9 CFR, Part 315, "Rendering or other disposal of carcasses and parts passed for cooking";

(14) 9 CFR, Part 316, "Marking products and their containers";

(15) 9 CFR, Part 317, "Labeling, marking devices, and containers";

(16) 9 CFR, Part 318, "Entry into official establishments; reinspection and preparation of products";

(17) 9 CFR, Part 319, "Definitions and standards of identity or composition", the department adds the following requirements, which shall apply except in the case of restaurant menus and signs.

(A) The label of products prepared from bison meat must contain the words "bison meat," "North American bison meat" or "Native American bison meat".

(B) The label of products prepared from buffalo meat must contain the words "water buffalo meat," or "Asian buffalo meat".

(18) 9 CFR, Part 320, "Records, registration, and reports";

(19) 9 CFR, Part 321, "Cooperation with States and territories";

(20) 9 CFR, Part 322, "Exports";

(21) 9 CFR, Part 325, "Transportation";

(22) 9 CFR, Part 327, "Imported products";

(23) 9 CFR, Part 329, "Detention; seizure and condemnation; criminal offenses";

(24) 9 CFR, Part 331, "Special provisions for designated States and Territories; and for designation of establishments which endanger public health and for such designated establishments";

(25) 9 CFR, Part 335, "Rules of practice governing proceedings under the Federal Meat Inspection Act";

(26) 9 CFR, Part 350, "Special services relation to meat and other products";

(27) 9 CFR, Part 352, "Exotic animals; voluntary inspection";

(28) 9 CFR, Part 354, "Voluntary inspection of rabbits and edible products thereof";

(29) 9 CFR, Part 355, "Certified products for dogs, cats and other carnivora; inspection, certification, and identification as to class, quality, quantity, and condition";

(30) 9 CFR, Part 362, "Voluntary poultry inspection regulations";

(31) 9 CFR, Part 381, "Poultry products inspection regulation", except §381.10(a)(3) through §381.10(c);

(32) 9 CFR, Part 416, "Sanitation";

(33) 9 CFR, Part 417, "Hazard Analysis and Critical Control Point (HACCP) Systems";

(34) 9 CFR, Part 424, "Preparation and Processing Operations";

(35) 9 CFR, Part 430, "Requirements for Specific Classes of Product"; and

(36) 9 CFR, Part 441, "Consumer Protection Standards: Raw Products".

(b) Copies of these regulations are available via the Internet at http://www.tdh.state.tx.us/bfds/msa/meatinsp.html.